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Supreme Court of the United States

OCTOBER TERM, 1955

No. 233

DIXIE CARRIERS, INC., COYLE LINES, INCORPORATED, AMERICAN BARGE LINE COMPANY AND FEDERAL BARGE LINES, INC., APPELLANTS,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

FILED JULY 13, 1955

JURISDICTION NOTED OCTOBER 10, 1955

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per diem about 8 cents. Adding the 44 cent unloading charge, the revenue to the barge line would be approximately $4.69, or 3.34 mills per gross ton.

As evidence of the reasonableness of the water rates, complainants show that joint barge-rail rates of $6.72 are maintained on sulphur from New Orleans and Baton Rouge, La. to Chicago, and Chicago Heights and South Chicago, Ill., and Dyer, East Chicago, Gary, Hammond, Hartsdale, and Indiana Harbor, Ind.; $4.60 from the same origins to East St. Louis and $7.85 to Mooar, Iowa. The all-rail rates from Port Sulphur and Galveston to all of those destinations are $9.184 except to East St. Louis where the rate is $8.736.

They also show joint barge-rail rates of $6.66 from Port Sulphur to Chicago Heights, Danville, Joliet, La Salle, and Streator, Ill., and $7.78 to Clinton and Dubuque, Iowa.

[fol. 27] American Barge Line's water distance is 1,208 [2] miles from Port Sulphur to East St. Louis. When this distance is used, its division from the Port Sulphur-Danville joint barge-rail rate earns 3.6 mills per gross-ton mile. American also maintains a rate on sulphur from Port Sulphur to Calvert, Ky., 1,094 miles, on the basis of 3.6 mills per gross-ton mile, and a rate to Joliet which earns 3.4 mills per gross-ton mile for a haul of 1,535 miles.

In *Sulphur from Port Sulphur, La., to Dubuque, Iowa*, 280 I. C. C. 593, an all-water barge rate on sulphur was found compensatory and just and reasonable. That rate produced revenues of 2.85 mills per gross ton-mile.

Defendants' evidence establishes that the rail rates are within the zone of reasonableness. The local rail rate on sulphur from East St. Louis to Danville, although now published specifically, was based upon an all-rail rate from East St. Louis to Joliet. That rate was originally established at a lower than maximum reasonable basis because of water competition. It originally was applied by intermediate application at Danville and later specifically published for application to Danville.

The general basis for rail rates on sulphur is 23.5 percent of first class in eastern territory and the maximum rea-

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[2] *Agent Roger's* I. C. C. 5.

[fol. 1] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Civil Action No. 8171

DIXIE CARRIERS, INC., et al., Plaintiffs,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al., Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed May 17, 1955

I

Notice is hereby given that Dixie Carriers, Inc., Coyle Lines Incorporated, American Barge Line Company, and Federal Barge Lines, Inc., the plaintiffs herein, hereby appeal to the Supreme Court of the United States from the final judgment dismissing the complaint, entered in this action on February 16, 1955.

Subsequent to the entry of final judgment, plaintiffs filed a Motion for New Trial, which motion was denied by order of court entered on March 28, 1955.

This appeal is taken pursuant to 28 U. S. C. 1253 and 2101(b).

II

The Clerk will please prepare a transcript of the entire record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the certified transcript of Proceedings before the [fol. 2] Interstate Commerce Commission in its Docket No. 30731 introduced in evidence at the trial of this case.

III

The questions presented by this appeal are as to whether the Interstate Commerce Commission acted within its authority in dismissing a complaint of the plaintiffs relating

to through routes and joint rates on sulphur from Galveston, Texas, via East St. Louis, Illinois, to Danville, Illinois, via the routes of the plaintiffs to East St. Louis and thence via the routes of the railroads named as defendants in said complaint, i. e., The New York Central Railroad Company, Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad Company, and Wabash Railroad Company, to Danville. Said complaint and the hearing had thereon presented to the Commission for decision an issue of discrimination between connecting lines under section 3(4) of the Interstate Commerce Act (49 U. S. C., section 3(4)). That issue arose because of the refusal of the said defendant railroads to maintain through routes and joint rates with the plaintiffs, while contemporaneously maintaining through routes and joint rates with connecting rail lines via East St. Louis under similar circumstances and conditions, and because said defendant railroads demand and assess their full local rate from East St. Louis to Danville on ex-barge sulphur while accepting out of their joint rates with connecting railroads a division thereof which is lower than said local rate.

The particular questions presented are:

1. Did the Commission correctly construe section 3(4) of the Interstate Commerce Act in holding that a division of a joint all-rail rate is not a "rate" or "charge" within the meaning of said section 3(4) of the Interstate Commerce Act?

2. In the absence of differentiating circumstances legally sufficient to excuse or to warrant the difference in treatment, does section 3(4) of the Interstate Commerce Act make unlawful the action of a railroad in participating with one [fols. 3-4] connecting carrier in through routes and joint rates and in refusing similar participation to another connecting carrier seeking to engage in the same through transportation?

3. Were the circumstances relied upon by the Commission as warranting a difference in treatment between the plaintiffs and the connecting lines with which the railroad defendants maintained through-routes and joint rates, legally sufficient for the purpose?

4. Is the challenged order of the Interstate Commerce

Commission supported by adequate findings and substantial evidence?

(S.) Nuel D. Belnap, Attorney for American Barge Line Company and Federal Barge Lines, Inc., One North La Salle Street, Chicago 2, Illinois. (S.) Donald Macleay, Attorney for Dixie Carriers, Inc. and Coyle Lines Incorporated, 1625 K Street, N. W., Washington 6, D. C.; E. V. Greenwood, Attorney for All Plaintiffs, Second National Bank Building, Houston 2, Texas.

[fols. 5-10] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

Filed 24 day of May, 1955. V. Bailey Thomas, Clerk, by W. Paul Harriss, Deputy.

[fol. 11] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Civil Action No. —

DIXIE CARRIERS, INC., Houston Texas; COYLE LINES INCORPORATED, New Orleans, Louisiana; American Barge Line Company, Jeffersonville, Indiana; Federal Barge Lines, Inc., St. Louis, Missouri, Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

COMPLAINT

(Equitable Relief Requested)

1. This complaint is brought against the United States and the Interstate Commerce Commission and the jurisdiction of this Court is conferred pursuant to 49 USC, sec-

Con 17(9); 28 USC, sections 1336, 1398, 2284 and 2321 to 2325, inclusive; and 5 USC, section 1009.

2. The plaintiffs above named, as more particularly described in paragraphs 3, 4, 5, 6, and 7 below, are common carriers by water, engaged in the transportation of general freight, including sulphur, in interstate commerce from and to various ports, including from Galveston, Texas, to East St. Louis, Illinois. Said plaintiffs are subject to part III of the Interstate Commerce Act (49 USC, sections 301 et seq.), are authorized by certificates issued by the Interstate Commerce Commission to engage in such transportation, and are connecting lines at East St. Louis, Illinois, of various railroads hereinafter named which are engaged in the transportation of property, including sulphur, over railroad routes from East St. Louis to Danville, Illinois.

[fol. 12] 3. Plaintiff, Dixie Carriers, Inc., is a corporation organized and existing under the laws of the State of Delaware, with its principal office at Houston, Texas.

4. Plaintiff, Coyle Lines, Incorporated, is a corporation organized and existing under the laws of the State of Delaware, with its principal office at New Orleans, Louisiana.

5. The barge routes of the plaintiffs named in paragraphs 3 and 4 above, as to the matters here involved, are via the Gulf Intracoastal Waterway from Galveston, Texas, to New Orleans, Louisiana, at which latter point they connect with the routes of plaintiffs American Barge Line Company and Federal Barge Lines, Inc.

6. Plaintiff, American Barge Line Company, is a corporation organized and existing under the laws of the State of Delaware, with its office at Jeffersonville, Indiana. The barge route of this plaintiff, as to matters here involved, is from Port Sulphur and New Orleans, Louisiana, to East St. Louis, Illinois. The said route of this plaintiff connects at New Orleans with the routes of plaintiffs Dixie Carriers, Inc. and Coyle Lines, Incorporated.

7. Plaintiff, Federal Barge Lines, Inc., is a corporation organized and existing under the laws of the State of Delaware, with its principal office at St. Louis, Missouri. Federal Barge Lines, Inc. is successor in interest to Inland Waterways Corporation (a corporation created by and existing under an Act of the Congress of the United States—Act of June 3, 1924; Title 49, Sections 151-157, USC), pur-

suant to the orders of the Interstate Commerce Commission of September 14, 1953, and December 3, 1953, in its Finance Docket No. 18261, entitled *Federal Barge Lines, Inc., Purchase, Etc.* References herein to plaintiffs in connection with proceedings before the Interstate Commerce Commission embrace Federal Barge Lines, Inc., as successor [fol. 13] in interest to Inland Waterways Corporation. The barge route of this plaintiff, as to matters here involved, is from Port Sulphur and New Orleans, Louisiana, to East St. Louis, Illinois. The said route of this plaintiff connects at New Orleans with the routes of plaintiffs Dixie Carriers, Inc. and Coyle Lines, Incorporated.

8. This complaint is brought to set aside and annul the reports and orders entered by the Interstate Commerce Commission (hereinafter referred to as the Commission) in a proceeding before it known as Docket No. 30731, *American Barge Line Company, et al. v. Chicago & Eastern Illinois Railroad Company, et al.* Copies of the reports and orders entered by the Commission in said proceeding are attached as Exhibits C and D hereto and made a part hereof.

9. On or about December 13, 1950, plaintiffs herein filed with the Commission their joint complaint known upon the records of the Commission as Docket No. 30731, *American Barge Line Company, et al.* v. *Chicago & Eastern Illinois Railroad Company, et al.* A true and correct copy of said complaint is attached hereto as Exhibit A and made a part hereof.

10. Railroads operating routes from their connections with plaintiffs at East St. Louis, Illinois, to Danville, Illinois, such railroads including the Chicago & Eastern Illinois Railroad Company, New York Central Railroad Company, Wabash Railway Company, and Illinois Terminal Railroad Company, were named as defendants in the complaint. In said complaint plaintiffs alleged in substance that the said defendants discriminated against them in their charges for [fol. 14] transportation in violation of Section 3(4)* of the

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*Section 3(4) of the Act provides as follows:

"(4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the in-

Interstate Commerce Act (49 USC, Section 3(4), by reason of the failure and refusal of said defendants to join with plaintiffs in a joint through barge-and-rail rate on sulphur from Galveston, Texas, to Danville, Illinois, to apply over the barge routes of plaintiffs from Galveston, Texas, to East St. Louis, and thence over the rail routes of defendants to Danville, while contemporaneously joining connecting rail lines operating from Galveston, Texas, to East St. Louis in joint through rates over through all-rail routes maintained by said defendants with said connecting railroads. Answers to said complaint were duly filed by the defendants named in said complaint.

11. Thereafter a hearing was had before an Examiner designated by the Commission, and the said Examiner issued his Proposed Report (attached hereto as Exhibit B, and made a part hereof), in which he held, among other things, that the Commission should find that the defendants, by accepting less than their local rate on sulphur when interchanged to them by rail connections at East St. Louis for movement to Danville, while charging their full local rate on sulphur when interchanged to them from plaintiffs for movement to Danville, constitutes discrimination between defendants' connecting carriers in violation of Section 3(4) of the Interstate Commerce Act.

[fol. 15] 12. Exceptions to the said Proposed Report of the Examiner, and replies thereto, were filed, and thereafter the matter was argued orally before Division 3 of the Commission. Under date of December 22, 1952, the Commission, Division 3, handed down a report and order, contrary to the

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terchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

recommendation of the Examiner, dismissing the complaint of the plaintiffs; one of the three members of the Division dissenting in a separate opinion. That report and order, with the dissenting opinion, is reported at 287 I. C. C. 403, and is attached hereto as Exhibit C, and made a part hereof. Thereafter, plaintiffs filed with the Commission their petition for reconsideration and reargument, and defendants replied thereto. By its order of May 18, 1953, the Commission reopened the said proceeding for oral argument, which was had before the Entire Commission. Under date of January 19, 1954, the E re Commission handed down its report and order on reconsideration, in which it affirmed the dismissal of the complaint by Division 3; three members of the Commission dissenting in a separate opinion. The said report and order on reconsideration, with the dissenting opinion, is attached hereto as Exhibit D, and made a part hereof. Thereafter, on February 15, 1954, the Secretary of the Commission issued a notice to the public of a modification in the dissenting separate opinion, and the said notice is attached hereto as Exhibit E, and made a part hereof.

13. The evidence taken at the hearing before the Commission in the proceeding above described showed that the defendants in the proceeding before the Commission refuse to participate with plaintiffs in the through movement of sulphur via the lines of the plaintiffs to East St. Louis and thence the lines of the defendants to Danville for any rate or charge for the rail portion of the through movement less than $2.95 per gross ton of 2,240 pounds, said rate and charge being the local rate of said defendants applicable upon sulphur in carloads originating at East St. Louis and [fol. 16] destined to Danville, and upon sulphur received by said defendants from connecting lines at East St. Louis for further transportation to delivery at Danville whenever said defendants maintain no joint through rates with connecting carriers from whom such sulphur is received. The evidence before the Commission further showed that the defendant railroads participate in the through movement of sulphur in carloads over all-rail routes from Galveston via East St. Louis to Danville, and accept out of the through rate maintained over those all-rail routes, as a charge or

compensation for their services from East St. Louis to Danville, a lesser amount than their said local rate of $2.95 per gross ton. The evidence before the Commission further showed that said defendant railroads in the proceeding before the Commission participate with the plaintiffs, American Barge Line Company and Inland Waterways Corporation (predecessor of Federal Barge Lines, Inc.) in joint through barge-and-rail rates on sulphur from Port Sulphur, Louisiana, via East St. Louis to Danville, Illinois, and that the said defendant railroads in the proceeding before the Commission accept out of said through barge-and-rail rates on sulphur from Port Sulphur a compensation or charge in the amount of $2.26 per gross ton.

14. The reports and orders of the Commission dismissing the complaint of the plaintiffs hereinabove described are capricious, arbitrary, erroneous, without rational basis, beyond the power of the Commission to enter, and in violation of the provisions of Part I of the Interstate Commerce Act (49 USC, section 1 et seq.) as administered and enforced with a view to carrying out the National Transportation Policy (49 USC, Note preceding section 1), and are contrary to the requirements of the Administrative Procedure Act (5 USC, section 1001 et sec.). The ultimate conclusions in said report are not supported by adequate findings and the said ultimate conclusions and the findings which the report does contain are not supported by substantial evidence and are contrary to the evidence. Said ultimate con-
[fol. 17] clusions in said report dismissing the plaintiffs' complaint rest upon a misconstruction and misapplication of section 3(4) of the Interstate Commerce Act (49 USC, section 3(4)) to the facts of the case as disclosed by the evidence in the record before the Commission.

15. Plaintiffs offer to prove all of the matters hereinbefore alleged and to establish that they have no plain, speedy or adequate remedy at law protecting their rights from the disastrous effects of the decisions, reports and orders of the Commission hereinabove described, which are subjecting them to irreparable loss and damage.

Wherefore, plaintiffs respectfully pray:

(a) That, as provided by Rule 4 of the Federal Rules of Civil Procedure, a summons issue immediately out of and

under the seal of this Court and be directed to the defendants above named, requiring said defendants, on a day certain therein to be specified, to be and appear before this Court and answer this complaint, but not under oath, answer under oath being expressly waived;

(b) That, as provided by Section 2284(1) of Title 28, U. S. C., the Judge of this Court to whom this complaint is presented, notify the Chief Judge of this Circuit who shall designate two other Judges, at least one of whom shall be a Circuit Judge, to serve, together with said Judge of this Court, as members of the Court to hear and determine this action;

(c) That upon the final hearing of this action, the Court so constituted enter a decree permanently suspending, enjoining, setting aside and annulling the said orders of said Commission; that this Court construe the statutes involved and determine and state the correct principles of law controlling the disposition of said complaint before the Commission, and determine the jurisdiction of the Commission in the premises; and that this Court thereupon remand said complaint to the Commission for further proceedings in [fols. 18-23] accordance with the controlling principles determined by this Court, or find and determine that plaintiffs are entitled to further consideration of their complaint before the Commission by the Commission and a decision thereon not inconsistent with the decision of this Court;

(d) That plaintiffs have such other and further relief in the premises as may be lawful and as may be deemed by this Court to be fit and proper.

Donald Macleay, Commonwealth Building, Washington 6, D. C., Attorney for Plaintiffs Dixie Carriers, Inc., Coyle Lines Incorporated. Nuel D. Belnap, Field Building, Chicago 3, Illinois, Attorney for Plaintiffs American Barge Line Company, Federal Barge Lines, Inc. (S.) E. V. Greenwood, Second National Bank Building, Houston 2, Texas, Attorney for all Plaintiffs.

Of Counsel: Macleay and Lynch, Commonwealth Building, Washington 6, D. C.; Walter, Burchmore and Belnap, Field Building, Chicago 3, Illinois; Fulbright, Crooker,

Freeman, Bates and Jaworski, Second National Bank Building, Houston 2, Texas.

[fol. 24] EXHIBIT "B" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. 30731

AMERICAN BARGE LINE COMPANY ET AL.,

v.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY ET AL.

Submitted Decided

1. Combination barge-rail rate on sulphur from Galveston, Texas, to Danville, Ill., over barge-rail route through East St. Louis, Ill., found unreasonable. Reasonable rate determined.

2. Lower division of joint through rate accepted by defendants for movement of sulphur from East St. Louis to Danville on ex-rail traffic than their local rate for similar movement ex-barge found to constitute discrimination between defendants' connecting carriers in violation of section 3(4) of the act. Appropriate order entered.

Nuel D. Belnap, John S. Burchmore, Robert N. Burchmore, Donald Macleay, and *Wesley A. Rogers* for complainants.

F. G. Robinson and *E. H. Thornton* for interveners supporting complainants.

Leo P. Day and *J. F. McWilliams* for defendants.

Report Proposed by Andrew C. Wilkins, Examiner

By complaint filed December 13, 1950, complainants allege that rates[1] and charges on sulphur over barge and rail routes from Galveston, Texas, through East St. Louis, Ill.,

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[1] Rates and differences in rates are stated in this report in amounts per ton of 2,240 pounds as of March 14, 1951.

to Danville, Ill., are excessive and unreasonable; that it is necessary or desirable in the public interest to establish through barge-rail routes and joint through rates with reasonable differentials under the all-rail rates; and that defendants' failure to establish and maintain such through barge-rail routes and joint barge-rail rates thereover is discriminatory against complainants as connecting carriers. The Commission is requested to prescribe through routes and joint rates.

The Galveston Chamber of Commerce was permitted to intervene and was represented at the hearing but did not otherwise participate in the proceeding. The allegation concerning the necessity or desirability in the public interest to establish through barge-rail routes was abandoned.

[fol. 25] The complainants, certificated carriers by water are (1) the American Barge Line Company and the Inland Waterways Corporation operating Federal Barge Lines (hereinafter referred to as Federal), which render common-carrier barge service on the Mississippi River and serve, among other ports, those of Port Sulphur and New Orleans, La., on the one hand, and East St. Louis, on the other; and (2) Coyle Lines, Incorporated, and Dixie Carriers, Inc., which operate common-carrier barge service from Galveston and points in the surrounding area to New Orleans. These latter Intracoastal Canal carriers join with the carriers rendering service on the Mississippi River in the publication of through routes and joint barge rates on sulphur from Galveston to East St. Louis. The distances from Galveston by water are 357 miles to New Orleans and 1,406 miles to East St. Louis.

The defendants provide single-line rail service from East St. Louis to Danville, and they participate with other rail carriers in joint-line rail service from Galveston and southeastern Texas sulphur mines to Danville. The short tariff route from Galveston is over the lines of the Texas and New Orleans Railroad Company to Shreveport, La., The Texas and Pacific Railway Company to Texarkana, Ark., Missouri Pacific Railroad Company (Guy A. Thompson, Trustee) to East St. Louis and Wabash Railroad Company beyond to Danville. The distances over that route from

Galveston are 850 miles to East St. Louis and 1,034 miles to Danville. Between the two points last named the distance is 184 miles.

The volume of the sulphur movement from the mines in the Galveston area to Danville approximates 20,000 tons a year. There has been no movement on the assailed barge-rail combination rate. During the last 6 months of 1950, the preponderance of the sulphur traffic from Galveston to Danville moved by barge to East St. Louis and rail beyond. That movement, however, was by a contract water carrier which has since discontinued operation. The traffic is now moving over all-rail routes from the mines in the interior of Texas to destination, and the all-rail rate from the mines is the same as that from Galveston.

The price of sulphur at Galveston is $1.50 a ton higher when loaded in barges than when loaded in rail cars at the mines. This higher rate reflects, in part, the rail rate of $1.10 from the mines to Galveston, 11 cents for wharfage, 37 cents for unloading from cars to storage bins, 22 cents for transfer from bins to barges, 4.55 cents for stevedoring, and 1.41 cents for pier rental.

There are no joint barge-rail rates in effect from Galveston to Danville or any other point. The barge-rail rates apply from "in barge" at Galveston and do not include the rail rate or other charges from the mines to "in barge." The rate from Galveston to Danville is a combination rate of $8.27, composed of the complainants' joint barge rate of $5.32 to East St. Louis, subject to a minimum of 1,500 tons, and the defendants' local interstate rail rate of $2.95, carload minimum 89,600 pounds, beyond. The barge lines do not absorb any portion of the cost of transporting the sulphur from the mines to, and loading it in, the barges at Galveston. From the joint barge rate of $5.32 the barge lines do absorb the cost of switching the loaded cars from the barge terminal at East St. Louis. The switching charge approximates 30 cents a ton and the per diem and reclaim charges average about 15 cents a ton. The charge for unloading the barges at the barge.

[fol. 26] Joint barge-rail rates have been in effect on sulphur on traffic from New Orleans since 1930. At that time sulphur moved in coastwise steamers from Galveston to

New Orleans where it was transferred to barges, moved upstream to East St. Louis by barge and transferred to rail cars for movement to Chicago. The traffic was handled on combination rates to and from New Orleans. Since that time other destinations in Illinois and Indiana have been added as destinations to which joint rates now apply. After the initial joint rates were published, joint barge-rail rates were published for application on sulphur from Port Sulphur to Joliet and a few other destinations in Illinois. Before September 22, 1949, the rate from Port Sulphur to Joliet applied by intermediate application at Danville over the lines of the Chicago & Eastern Illinois and the New York Central Railroad Companies. The other defendants requested inclusion in a joint rate published for specific application from Port Sulphur to Danville and the rate from Port Sulphur to Joliet became applicable at Danville by specific publication.

The complainants publish joint barge rates from Galveston to East St. Louis and other up-river ports with interchange arrangements at New Orleans. Port Sulphur and New Orleans are grouped for rate purposes. The joint barge rates from Galveston are made $1.01 higher than those from New Orleans.

Under the present barge rate from Galveston to East St. Louis the barge line bears no portion of the cost of transporting to and loading sulphur in barges at Galveston. From the joint barge rate the barge line absorbs the cost of switching the loaded cars from the barge terminal at East St. Louis. The switching approximates 30 cents a gross ton and the per diem and reclaim charges average about fifteen cents a gross ton. The unloading charges are 44 cents a gross ton at the barge terminal in East St. Louis. The tariff is silent concerning absorption of the unloading charges. The barge lines are willing to absorb those charges. The $5.32 rate produces revenue of 3.78 mills a gross ton mile. Under the sought rate, $7.67, and predicated upon a rail division of $2.26 (the rail division of the $6.66 Port Sulphur-Danville rate) the barge division would be $5.41 which would earn revenue of 3.84 mills per gross ton-mile. On a joint through barge-mile rate, the switching charge would approximate 20 cents per gross ton and

sonable basis for rates on sulphur from the southwest to the east is column 13.5. See *Marion Mfg. Co.* v. *Akron, C. & Y. R. Co.*, 274 I.C.C. 493. The current all-rail rate is 8.6 percent of the current first class (exceptions) rate from Texas producing points to Danville. The East St. Louis—Danville rate is 9.2 percent of first class. These facts indicate that the rail rates are not unreasonable.

The barge factor of the present combination of rates is within the zone of reasonableness for the service rendered. The rail factor, measured by the available criteria, is also within the zone of reasonableness for the local transportation of sulphur from East St. Louis. Yet the combination of the factors is sufficiently high to foreclose commercial use of the barge-rail route. The end result flows from the fact that the through all-rail rate is itself depressed because of the efforts of the rail carriers to hold the sulphur traffic to rails.

In section 307(d) the Commission is empowered to establish joint rates applicable to the transportation of property by common carriers by water and by railroad and prescribe such reasonable differentials as it may find to be justified between all rail rates and the joint rates in connection with such common carriers by water. In *Rail and Barge Joint Rates*, 270 I. C. C. 591, 613, after a review of the legislative history of the above section and Congressional policy with respect to water transportation on the Mississippi River it was concluded that joint barge-rail routes and rates generally are necessary and desirable in the public interest and that differentials between such rates and all rail rates are justified.

[fol. 28] It is the common law as well as statutory duty of common carriers by water and by rail to establish reasonable through routes. Such a through barge-rail route now exists for the transportation of sulphur from Galveston through East St. Louis to Danville. It is commercially a closed route because the combination of rates are now above the level at which the traffic will move over that route. The law also requires that the rates, fares and charges over through routes be just and reasonable. The barge factor of the combination of rates is not unduly high and appears to be reasonable. Similarly, the rail factor of the

combination, when considered separately, is within the zone of reasonableness.

It does not follow, however, as a matter of law, that the through rate is reasonable merely because the factors of the combination, when considered separately are themselves reasonable for the movement of the traffic between the points for which the separate rates have application. See *American Tar Products Co.* v. *Alabama G. S. R. Co.*, 160 I. C. C. 651, 655; 179 I. C. C. 366; 192 I. C. C. 703. This is particularly true of joint water-rail traffic. The Commission's "authority to require joint water-rail rates differentially lower than the corresponding all-rail rates is not limited to situations in which the all-rail rates are on a maximum reasonable basis." *Application of Inland Nav. Co.*, 218 I. C. C. 393, 402. This is necessarily so. Otherwise, the railroads, by reducing rates could drive the barge lines out of business. The problem, then, is one of relative reasonableness of the assailed barge-rail combination.

The argument under section 3(4) of the act is that the defendants refuse to join in the barge-rail transportation of sulphur from Galveston to Danville on any other basis than the full local rate of $2.95 while rendering similar transportation service if the traffic is taken from rail lines at East St. Louis for which the defendants receive a division less than $2.95 per ton. The defendants participate in a joint barge-rail rate on sulphur from Port Sulphur to Danville and their division of that rate is $2.26.

The general rule is that divisions of joint through rates are not a test of the lawfulness of separately established rates. See *Bituminous Coal to Youngstown*, 163 I. C. C. 3, 12 and *Ashland Coal & Ice Co.* v. *Atlantic Coast Line R. Co.*, 241 I. C. C. 120, 132. The reasons advanced for the rule are that many factors enter into the determination of divisions of rates among participating carriers which factors are not relevant or material in the determination of the lawfulness of rates. Another rule of widespread application is that the shipper has no interest in the divisions of joint through rates. See *L. & N. R. R.* v. *Sloss-Sheffield Steel & Iron Co.*, 269 U. S. 217. Here the rationale is that the question is the reasonableness of the through rate and not the way in which the revenue is divided or appor-

tioned among the carriers. These principles, however, revolve around the shipper carrier relation. A different situation is presented when the problem is between carriers. This clearly occurs when the relief sought is the prescription of divisions under section 15(6) where the Act makes provision for the prescription of divisions of joint rates, fares or charges. In section 3(4) the provision is that "All carriers subject to the provisions of this part [fol. 29] * * * shall not discriminate in their rates, fares, and charges between connecting lines * * *." Connecting lines by proviso include any common carrier by water subject to part III. Here the act is silent as to divisions. As this portion of the act was construed in *I. C. C.* v. *Mechling*, 330 U. S. 567, it means that the defendants are prohibited from charging more for the transportation of sulphur from East St. Louis to Dainville when the traffic is received from the barge lines than when the traffic is received from the rail connections at East St. Louis. The question then, is whether, in the instant case, a division of a rail joint rate is a charge within the meaning of the words "rates, fares, and charges" as used in section 3(4) of the act. In *Rates on Railroad Fuel and Other Coal*, 36 I. C. C. 1, at 13, it was stated "* * * the divisions applicable on fuel coal traffic are, in effect, rates, and there is good reason why they should be published by filing with the Commission and open to public inspection." A similar conclusion was reached in the *Tap Line case*, 31 I. C. C. 490. In those instances, the rail carriers were also the interested shippers. In somewhat different circumstances, it was found that, where the dispute arose between carriers, divisions were the cause of discrimination. In *Western Pacific R. R. Co.* v. *Southern Pacific Co.*, 55 I. C. C. 71, the Southern Pacific Company and the Atchison, Topeka & Santa Fe Railway Company maintained through routes and joint passenger fares from and to practically all points in California, and also participated in the same fares with the Western Pacific but the defendant lines made better divisions of those through fares between themselves than the divisions either carrier made with the complainant line. It was there alleged that the divisions caused discrimination under section 3 of the act. Defendants ad-

mitted the difference in divisions but contended that those differences did not constitute discrimination. At page 73 of that opinion it was stated "The expression of rates and charges in the form of divisions makes them none the less rates and charges which may be discriminatory," and the following appears at page 81:

> We have said many times that ordinarily the passenger or shipper is not interested in the division of joint rates between carriers. It has appeared in many cases before us and is a matter of common knowledge that carriers frequently take advantage of their strategical position and demand divisions which fairly compensate them for surrendering a part of the line haul which they could perform. Carriers that are disadvantageously located are frequently willing to accord liberal divisions in order to be permitted to share in traffic to or from a point reached only by a competitor. It can not, however, be said that the carrier having the strategical advantage may lawfully accept from one of its connections a division which permits that competitor to share on fair and compensatory terms in the competitive traffic and at the same time demand from another connection for the same service in movement of the same competitive traffic a division so high as to make it impossible for it to share therein on a compensatory basis. In other words, if the carrier having the strategical advantage were to admit one competitor to share in the traffic and exclude another [fol. 30] by refusing to enter into any arrangement with it, or effect the same exclusion by exacting divisional arrangements which would prohibit participation by that connection in the traffic, the discrimination would be unlawful.

That situation appears to be comparable with that in the instant proceeding. In *Auckenbeck S. S. Co.* v. *Southern Ry. Co.*, 157 I. C. C. 752, the intercoastal steamship company contended that the rail carriers in the Southwest beyond New Orleans, La., should accord the ex-water traffic proportional rates to destinations in the Southwest equal to the divisions which the rail lines received on all-rail traffic

Louis, which would make the toal cost $4.32 per gross ton for moving sulphur by barge from Galveston to East St. Louis and delivering it to defendants at that point for movement to Danville. This may be contrasted with complainants' rate of $5.32, for local delivery, and $5.41, as a component of their proposed joint rate, to East St. Louis from [fol. 43] Galveston, and suggests the observation that if any reduction in the barge-rail charge from Galveston to Danville is needed it ought to come out of the barge factor and not out of the depressed rail factor.

Upon reconsideration, we find that the findings in the prior report should be, and they are, affirmed.

KNUDSON, Commissioner, dissenting:

I am in disagreement with the conclusion reached on the issue under section 3(4) of the act. The complaining barge lines are willing to absorb the charge for the transfer of the sulphur from the barge to the rails at East St. Louis, and there is here no serious contention that in other respects the circumstances affecting the transportation from East St. Louis to Danville are any different for the ex-barge than for the ex-rail traffic. It is true that the record fails to show the division of the joint all-rail rate received by the East St. Louis-Danville defendants, but it does show that on ex-barge traffic the division is less than the local rate from East St. Louis to Danville.

In *Interstate Commerce Commision* v. *Mechling*, 330 U. S. 567, the Supreme Court held that the provisions of section 3(4) as applied to the facts in that case meant "that Chicago-to-the-east railroads cannot lawfully charge more for carrying ex-barge than for carrying ex-lake or ex-rail grains to and from the same localities, unless the eastern haul of the ex-barge grain costs the eastern railroads more to haul than does ex-rail or ex-lake grain." Although on all-rail traffic the amount received by the East St. Louis-Danville lines is a division of the through charge, nevertheless it seems to me that the principle stated by the Supreme Court [fol. 44] has application. The cause for complaint lies in the fact that these lines demand the rate of $2.95 per long ton applying from East St. Louis locally to Danville on traffic

from the Pacific Coast. That contention was not sustained. It should be noted, however, that the question of discrimination between carriers was not considered on the ground that "that portion of section 3 which provides that carriers shall not discriminate in their rates, fares, and charges between connecting lines had application only to such connecting lines as were subject to regulation by us", citing *Capehart & Smith v. L. & N. R. R. Co.*, 4 I. C. C. 265. In the instant proceeding, the Commission has jurisdiction over the complainants under part III of the act.

Defendants urge that the circuity of the barge-rail route is a bar to the relief sought. They rely upon the decision in *Rail and Barge Joint Rates, supra*, where at page 609, certain restrictions were stated concerning circuity limitations used in the prescription of joint barge-rail rates. The limitation relied upon is that:

> "* * * no barge-rail route need be established where the short-line all-rail distance via the lines of said rail carriers from the point of origin to point of destination through the port of interchange with the barge line exceeds by more than 40 percent the shortest rail distance between such origin and destination."

The measure of that limitation is the percentage of circuity of the all-rail route from point of origin through the port of interchange to destination as compared with the short line all-rail route from origin to destination. Insofar as is material in this proceeding the origin of the traffic is Galveston and the port of interchange is East St. Louis. That limitation was designed to prevent wasteful transportation.

The short-line rail distances from Galveston are 823 miles to East St. Louis and 977 miles to Danville and the short tariff routes are 850 and 1,034 miles, respectively. Over one indirect east-bank route,[3] the rail distance is 1,339 miles.

These distances indicate that the rail carriers herein would perform no wasteful transportation. If the barge

[3] Southern Pacific to New Orleans, Illinois Central to East St. Louis and Wabash beyond.

lines are to participate in the traffic, they must use the only highway of commerce available to their form of transportation. From the evidence of record, it appears that the rate they propose will be remunerative for the service they would perform. The parties agree that the barge rate from Galveston to East St. Louis may be assumed to be reasonable. Under those circumstances, the relation of the [fol. 31] barge-rail route to the short-line all-rail route, constitutes no bar to the relief sought.

Defendants urge that relief should be denied herein because the complainants may handle sulphur by moving it in tows with not more than two other bulk commodities in which case the traffic would not be subject to regulation under the act and the complainants could handle the traffic without regard to published rates. By seeking a joint rate complainants subject themselves to the jurisdiction of this Commission with respect to the joint rates on this traffic.

In the sale of sulphur, it is the practice of the producers to sell the product produced in the Galveston area at the same price as that produced in the Port Sulphur area and to compete therewith, the Galveston producers absorb the difference between the transportation charges from the two producing areas. For this reason, complainants do not seek a large differential between the barge-rail rate here proposed and the present all-rail rate.

Defendants rely upon *Rail and Barge Joint Rates, supra*, (affirmed in *Alabama Great Southern R. Co. v. United States*, 340 U. S. 216) where at page 618 it was stated:

> Bulk commodities are largely handled in all-water service or on combination rates not under common arrangement for through carriage for the reason that quantities transported by barge must be larger than the ordinary carload in order to use the cargo-carrying space. Furthermore, interior points generally do not have facilities for handling such large consignments. For that reason, we shall not prescribe through routes and joint rates on bulk commodities.

That proceeding was broad in scope and included all through routes and joint rates between barge and rail lines on commodities generally. The instant proceeding relates to the through rate on one commodity from one origin to

one destination. It is true that bulk commodities are usually handled either in all-water service or on combination rates and that different minimum weights are required for barge and rail movement. The minimum weight problem is not an insurmountable obstacle because there are now published joint barge-rail rates on sulphur. The minimum weight provisions applicable on the Port Sulphur-Danville barge-rail rate should be used in the findings hereinafter made. In the instant proceeding, facilities exist at destination to handle barge load quantities of sulphur. The factual situations are different in the instant proceeding from those existing in the cited proceeding. There, the relief sought was the prescription of joint through routes while here the through route is in existence.

The Commission should find that the combination barge-rail rate applicable on sulphur from Galveston, interchanged to defendants at the port of East St. Louis to Danville is unreasonable to the extent that it exceeds $7.67, minimum weight 500 tons to East St. Louis and 80,000 pounds beyond; and that defendants, by accepting less than their local rate on sulphur, when interchanged with rail connections at East St. Louis for movement to Danville, while charging their full local rate on traffic interchanged to them from the complainants constitutes discrimination between defendants' connecting carriers in violation of Section 3(4) of the act.

An appropriate order should be entered.

[fol. 32] EXHIBIT "C" TO COMPLAINT

Interstate Commerce Commission

No. 30731.

AMERICAN BARGE LINE COMPANY, et al.

v.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, et al.

Submitted April 25, 1952. Decided December 22, 1952.

Combination barge-rail rate on sulphur from Galveston, Tex., to Danville, Ill., found not shown to be unreasonable

In my separate expression in connection with the prior report herein, I dissented also from the finding there made, and here affirmed, that the establishment of a joint barge-rail rate on this traffic was not shown to be necessary or desirable in the public interest. I am now satisfied that such a finding would not be needed if the relief which I would accord under section 3(4) of the Act were granted.

Commissioners Mahaffie and Alldredge authorize me to state that they join in this expression.

Commissioner Arpaia did not participate in the disposition of this proceeding.

By the Commission. George W. Laird, Secretary.
(Seal.)

[fols. 52-53] [File endorsement omitted]

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

ANSWER OF THE UNITED STATES—Filed May 27, 1954

Now comes the United States, a defendant herein, and, assuming a neutral position in the proceedings, for its answer to the complaint:

1. Admits the allegations of paragraph 1 of the complaint.

2. Neither admits nor denies any of the other allegations of the complaint.

(S.) James E. Kilday, (S.) Albert Parker, (S.) Maurice A. Fitzgerald, Special Assistants to the Attorney General, Attorneys for Defendant, United States of America.

Stanley N. Barnes, Assistant Attorney General, Malcolm R. Wilkey, United States Attorney, By (S.) C. B. Smith, Assistant United States Attorney.

or otherwise unlawful; establishment of a joint differential barge-rail rate on the same traffic found not shown to be necessary or desirable in the public interest; and allegation of discrimination under section 3 (4) of the act not sustained. Complaint dismissed.

Nuel D. Belnap, John S. Burchmore, Robert N. Burchmore, Donald Macleay, and Wesley A. Rogers for complainants. F. G. Robinson and E. H. Thornton, for interveners supporting complainants.

Leo P. Day and J. F. McWilliams for defendants.

Report of the Commission

Division 3, Commissioners Patterson, Johnson, and Kudson By Division 3:

Exceptions to the proposed report of the examiner were filed by the defendants and the complainants. The complainants replied to the defendants' exceptions. Our conclusions differ from those recommended by the examiner. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and found not justified.

By complaint filed December 13, 1950, the comp-i-ants allege that the rates [1] and charges on sulphur over barge-rail routes from Galveston, Tex., through East St. Louis, Ill., to Danville, Ill., are unreasonable; that it is necessary or desirable in the public interest to establish through barge-rail routes and joint through rates, with reasonable differentials under the all-rail rates; and that the defendants' failure to establish and maintain such through barge-rail routes and joint rates is discriminatory against the complaining barge lines as connecting carriers. We are asked to prescribe through rates and joint rates. The Galveston Chamber of Commerce was permitted to intervene, and was represented at the hearing but did not otherwise participate in the proceeding.

[fol. 33] The complainants, certificated water carriers, are

[1] Rates, rate differences, and charges are stated in this report in amounts per ton of 2,240 pounds, as of March 14, 1951.

American Barge Line Company and the Inland Waterways Corporation operating Federal Barge Lines (hereinafter referred to as Federal) which render common carrier barge service on the Mississippi River and serve, among other ports, those of Port Sulphur, La., and New Orleans, La., on the one hand, and East St. Louis, Ill., on the other, and Coyle Lines, Incorporated, and Dixie Carriers, Inc., which operate common carrier barge service from Galveston, Tex., and points in the surrounding area to New Orleans. The named Intracoastal Canal carriers join with the carriers which render service on the Mississippi River in the publication of through routes and joint barge rates on sulphur from Galveston to East St. Louis.

The defendants render single-line rail service from East St. Louis to Danville.

The present all-rail rate on sulphur from Galveston to Danville is $9.184 per gross ton.

The present rate for the barge-rail movement of sulphur from Galveston to Danville is $8.27 based upon a combination of factors of a joint barge rate of $5.32 from Galveston to East St. Louis, subject to 1,500 tons minimum and the local rail rate of $2.95 beyond, subject to C. L. minimum of 89,600 pounds. Complainants seek a joint through rate of $7.67. There are no joint barge-rail rates in effect from points in Texas to Danville or to other rail destinations in Illinois. There have never been any point barge-rail rates published for application on sulphur from Galveston to any point.

The water distance between Galveston and East St. Louis is 1,406 miles.

The price of sulphur at Galveston is $1.50 per ton higher when loaded in barges than when loaded in rail cars. That amount reflects, in part, charges of $1.10, the rail rate from the mines to Galveston, 11 cents for wharfage, 37 cents for unloading from cars to storage bins, 22 cents for transfer from bins to barges, 4.55 cents for stevedoring, and 1.41 cents for pier rental. That difference has been recognized in recent proceedings. See *Sulphur from Louisiana and Texas to Clinton, Iowa*, 280 I.C.C. 789.

The present combination barge-rail rate is $5.32 plus $2.95 or $8.27. When the difference of $1.50 per ton is

added, the figure becomes $9.77. The $7.67 rate sought by complainants would result in rail-barge charge of $9.17. Under the present rates when shipped by barge, the rail-barge charges to the consignee are 58.6 cents higher than when shipped by rail. The $7.67 rate would produce charges of $9.17 or 1.4 cents lower than the charges for all rail movement.

There has been no movement on the assailed barge-rail combination rate. During the last 6 months of 1950, the preponderance of the sulphur traffic from Galveston to Danville moved by barge to East St. Louis and rail beyond. This traffic was not handled by complainants but by a contract water carrier, which has now discontinued operation. At present the traffic is moving over all-rail routes from origin to destination.

* * * * * * *

[fol. 34] ——terminal in East St Louis is 44 cents a ton. The tariff is silent concerning absorption of the unloading charges; however, the barge lines are willing to absorb those charges. Based on the distance of 1,590 miles over the barge-rail route from Galveston to Danville, the rate of $8.27 yields 5.2 mills a gross-ton mile.

The all-rail rate on sulphur from Galveston and these south-eastern Texas mines, such as New Gulf, about 60 miles west of Galveston, to Danville is $9.184. Based on the rail short-tariff route distance of 1,034 miles from Galveston to Danville, that rate yields 8.8 mills a gross-ton mile. The general basis for rail rates on sulphur in eastern territory is 23.5 percent of first class, and a basis of column 13.5 from the Southwest to points in official territory was approved as not unreasonable in *Marion Mfg. Corp.* v. *Akron C. & Y. R. Co.*, 274 I. C. C. 493. The all-rail rate of $9.184 is 8.6 percent of the first-class (exceptions) rate from the Texas producing points to Danville, and the rail rate of $2.95 from East St. Louis to Danville is 9.2 percent of first class. It is apparent that these rail rates are on a depressed basis.

The complainants propose the establishment of a joint barge-rail rate of $7.67, to be divided $5.41 for the barge lines and $2.26 for the rail lines. Thus, the proposed barge

nies the truth of each of and all the allegations contained in the complaint, insofar as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said report referred to and made a part of the complaint herein as Exhibit D.

All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that said complaint be dismissed.

Interstate Commerce Commission, (S.) Samuel R. Howell, Assistant Chief Counsel.
(S.) Edward M. Reidy, Chief Counsel, Of Counsel.

[fol. 58] [Title omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[File endorsement omitted]

[Title omitted]

MOTION TO INTERVENE OF NEW YORK CENTRAL RAILROAD COMPANY, ET AL—Filed June 22, 1954

Now come the New York Central Railroad Company, Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad Company, and the Wabash Railroad Company and respectfully move the Court for leave to appear as Intervenors in support of the final order of the Interstate Commerce Commission in the above-entitled proceeding, and in support of said motion state as follows:

1. By the instant proceeding the plaintiffs contest the validity of the order of the Interstate Commerce Commission entered in a proceeding before the Commission in Docket No. 30731 styled as "American Barge Line Company, et al vs. Chicago & Eastern Illinois Railroad Company, et al."

2. That the petitioners were named as defendants in the plaintiffs' compiaint before the Interstate Commerce Commission and, as such, were parties in interest to those proceedings.

division of $5.41 exceeds the present barge rate from Galveston to East St. Louis by 9 cents. The proposed rate is for a loading of not less than the minimum for a bargeload to East St. Louis and the carload minimum beyond, apparently the same as applicable in connection with the present combination rate. The proposed rate was arrived at by adding $1.01 to the voluntarily-published joint barge-rail rate of $6.66 from Port Sulphur to Danville. The proposed $1.01 spread, Galveston over Port Sulphur, reflects the relation in rates from those origins in the all-water rate structure to destinations on the Mississippi River and on the Great Lakes. The complainants state that the divisions of the joint barge-rail rate of $6.66 from Port Sulphur to Danville are $4.40 for the barge lines and $2.26 for the rail lines. Based on the distance of 1,590 miles over the barge-rail route from Galveston to Danville, the proposed rate would yield 4.8 mills a gross-ton mile.

The complainants state that the proposed rate was requested by a shipper. No one testified at the hearing in behalf of any shipper. In comparing the cost, all-rail versus barge-rail, to the shipper, the greater price of the sulphur when loaded in barges, in the amount of $1.50, should be added to the proposed barge-rail rate, resulting in $9.17 a gross ton, as compared with $9.184 for transportation over the all-rail route.

In further support of their contention that the proposed joint barge-rail rate of $7.67 would be reasonable, the complainants compare it with joint barge-rail rates on sulphur from New Orleans and Baton Rouge, La., of $6.72 to Chicago, Ill., and certain other points in the Chicago district, $7.85 to Mooar, Iowa, and $4.60 to East St. Louis. They also show joint barge-rail rates on sulphur from Port Sulphur of $6.66 to Chicago Heights, Joliet, LaSalle, and Streator, Ill., and $7.78 to Clinton and Dubuque, Iowa. Those rates were voluntarily established and apply by barge to East St. Louis and rail beyond, except that the rate of [fol. 35] $4.60 to East St. Louis applies by barge to Cairo, Ill., and rail beyond. Unlike Danville, most of the destinations to which these joint barge-rail rates apply are served directly by barge in competition with all-rail and barge-rail routes.

3. Section 2323, Title 28.—Chapter 157 U.S. Code [62 Stat. 970] [63 Stat. 105] provides in part as follows:

> "The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement, or any part thereof, and the interest of such party."

[fol. 59] Wherefore, the petitioners respectfully pray for leave to intervene in the above-entitled proceedings as Intervenors in support of the order of the Interstate Commerce Commission, and be represented by their counsel,

John A. Daily, 1225 LaSalle Street Station, Chicago 5, Illinois; Palmer Hutcheson, Jr., Hutcheson, Taliaferro & Hutcheson, 1720 Niels Esperson Building, Houston, Texas, Attorneys for Intervenors.

Copies of this motion and the accompanying pleading have been mailed this June 22, 1954, to counsel for all parties.

Palmer Hutcheson, Jr.

[fol. 60] In the United States District Court for the Southern District of Texas, Houston Division

[Title omitted]

Answer of Intervenors in Support of the Order of the Interstate Commerce Commission

Now come the Intervenors, The New York Central Railroad Company, Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad Company, and Wabash Railroad Company, and for their answer to the complaint and in support of the order of the Interstate Commerce Commission state as follows:

I

Deny that the plaintiffs are connecting lines at East St. Louis with these defendants, as alleged in Paragraph 2 of the complaint.

Section 307(d) of the Interstate Commerce Act reads, in pertinent part, as follows:

> The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, * * * establish through routes, * * * and joint rates, * * * applicable to the transportation of * * * property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged * * *. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water.

Under the foregoing provisions of the act, we must prescribe joint rates for transportation partly by rail, and partly by water in instances where it is shown that such rates are necessary or desirable in the public interest. As stated, no shipper has evidenced an interest in the establishment of the rate sought, and the rate over the all-rail route which it is intended to meet is on a depressed basis. The defendants urge that their participation in barge-rail routes as desired by complainants, is not shown to be necessary or desirable in the public interest.

This issues herein are similar to those in *Algonquin-Missouri Chemical Corp.* v. *Atchison, T. & S. F. Ry. Co.*, I. C. C. (No. 30792, decided June 20, 1952, mimeographed), wherein Division 3 found that the establishment of a joint differential barge-rail rate on sulphur from Port Sulphur to DeSoto, Kans., was not shown to be necessary or desirable in the public interest and that an allegation of discrimination under section 3(4) of the act had not been sustained. There, the existing all-rail rate was $8.74, the barge-rail rate was a combination composed of a barge rate of $5.10 to Kansas City, Mo., and a rail rate of $4.03 beyond, and the proposed joint barge-rail rate was $7.76 and would have yielded 5.1 mills per gross-ton mile for a distance of 1,522 miles.

The record before us does not warrant a finding that the

Company and the Wabash Railroad Company to intervene as parties herein, and the Court having considered said motion and the pleadings tendered therewith, and it appearing to the Court that the said The New York Central Railroad Company, Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad Company and the Wabash Railroad Company should be permitted to intervene as prayed, and the Court being duly advised in the premises,

It is ordered, that The New York Central Railroad Company, Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad Company and the Wabash Railroad Company and each of them have leave to intervene in this cause and each is hereby made a party to this cause and to that end may file a pleading in this cause in the same manner and with like effect as if named an original party to this cause.

(S.) Ben C. Connally, Judge.

Houston, Texas, June 22, 1954.

[fol. 65] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

MOTION TO INTERVENE OF AMERICAN WATERWAYS OPERATORS, INC.—November 3, 1954

Now comes the American Waterways Operators, Inc. and respectfully moves the Court for leave to appear as an Intervenor in support of Plaintiffs in the above-entitled proceeding and in support of said motion states as follows:

1. By the instant proceeding, the Plaintiffs protest the validity of the Order of the Interstate Commerce Commission entered in a proceeding before the Commission in Docket No. 30731 styled as "American Barge Line Com-

present through barge-rail rate is unreasonable or otherwise unlawful for the service offered thereunder, and affords no basis for a finding of unlawful discrimination under section 3(4) of the act.

In reaching our conclusions herein we are not unmindful of the provisions of the national transportation policy, which call for a fair and impartial regulation of all modes of transportation subject to the act, so administered as to recognize and preserve the inherent advantages of each. We do not believe, however, that this policy requires us to force rail carriers, where they maintain a depressed rate to meet water competition, to further depress their earnings on the traffic in order to favor that same form of competition. Danville is 184 miles from the end of the barge-line service, and the rail rate for that 184-mile haul is depressed at least [fol. 36] from 13.5 to 9.2 percent of first class. If the barge lines can reasonably be expected to participate in this movement, the opportunity to do so should be afforded, not by the establishment of a through barge-rail rate differentially under an all-rail adjustment which is already severely depressed, but by a reduction in the barge rate from Galveston to East St. Louis or by an increase in the depressed rail rate, or both. There is no allegation here that the all-rail rate, or any factor thereof, is unreasonably low.

We find that the establishment of a joint rate and through route as sought is not shown to be necessary or desirable in the public interest, and that the allegation under section 3(4) of the act has not been sustained. The complaint will be dismissed.

KNUDSON, *Commissioner*, dissenting:

The national transportation policy requires us to provide for fair and impartial regulation of all modes of transportation subject to the provisions of the act so administered as to recognize and preserve the inherent advantages of each. All provisions of the Interstate Commerce Act are to be construed in the light of this policy. In the circumstances here presented, where the railroads depress their through rail rates from Galveston to Danville to meet and overcome barge competition and refuse to accord similar

treatment on ex barge traffic for the rail haul from St. Louis to Danville, this policy would be subjected to severe stress were we to continue to indorse this situation.

Sulphur is a commodity which readily lends itself to transportation by barge. It can be and is transported in barge load quantities. The time in transit is not of great importance and the nature of the commodity is such that its deteriorating effect upon the equipment used to transport it is probably less in the case of barge equipment than in the case of railroad equipment. In addition, the use of barges to transport a portion of this traffic will release needed rail equipment. There is no reason to believe that the establishment of joint barge-rail rates upon a proper basis will do more than allow the barge lines to obtain a share of this traffic. The foregoing factors are sufficient to show that the establishment of joint barge-rail rates are necessary and desirable in the public interest.

[fol. 37] ORDER

At a Session of the Interstate Commerce Commission, Division 3, Held at its Office in Washington, D. C., on the 22nd Day of December, A. D. 1952

No. 30731

AMERICAN BARGE LINE COMPANY et al.,

v.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY et al.

This proceeding being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof;

It is ordered, That the complaint in this proceeding be, and it is hereby, dismissed.

By the Commission, division 3. George W. Laird, Acting Secretary. (Seal.)

pany, et al. vs. Chicago & Eastern Illinois Railroad Company, et al."

2. That the Petitioner was an intervenor in support of Plaintiffs' complaint before the Interstate Commerce Commission and as such was a party in interest to those proceedings.

3. Section 2323, Title 28.—Chapter 157 U. S. Code [62 Stat. 970] [63 Stat. 105] provides in part as follows:

> "The Interstate Commerce Commission and any party or parties in interest to the proceeding before [fol. 66] the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party."

Wherefore, the Petitioner respectfully prays for leave to intervene in the above-entitled proceedings as an Intervenor in opposition to the Order of the Interstate Commerce Commission and be represented by their counsel.

John H. Eisenhart, Jr., 1319 F Street, N.W., Washington 4, D. C.; E. V. Greenwood, Second National Bank Building, Houston 2, Texas, Attorneys for Intervenor.

Copies of this motion and the accompanying pleadings have been mailed this 3rd day of November, 1954 to counsel for all parties, or delivered in person, to counsel for each such party on such date.

E. V. Greenwood.

[fol. 67] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

ORDER ALLOWING INTERVENTION—November 3, 1954

This cause coming on to be heard on the motion of the American Waterways Operators, Inc. to intervene as a

[fol. 38] EXHIBIT "D" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. 30731

AMERICAN BARGE LINE COMPANY et al.,

v.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY et al.

Submitted November 4, 1953. Decided January 19, 1954

On reconsideration, combination barge-rail rate on sulphur from Galveston, Tex., to Danville, Ill., found not shown to be unreasonable; establishment of a joint barge-rail rate on the same traffic found not shown to be necessary or desirable in the public interest; and allegation of discrimination under section 3(4) of the act not sustained. Prior findings, 287 I. C. C. 403, affirmed.

Appearances as shown in prior report and in addition:

John H. Eisenhart for an intervener supporting complainants.

John A. Daily for defendants.

Report of the Commission on Reconsideration

By the COMMISSION:

In the prior report herein, 287 I. C. C. 403, decided December 22, 1952, division 3 found that the combination rate on sulphur by barge from Galveston, Tex., to East St. Louis, Ill., and thence by rail to Danville, Ill., was not shown to be unreasonable for the service offered thereunder, that the establishment of a joint differential barge-rail rate as sought was not shown to be necessary or desirable in the public interest, and that the allegation of discrimination against the complaining barge lines under section 3(4) of the Interstate Commerce Act had not been sustained. Upon complainants' petition and replies by defendants, the proceeding was reopened for reconsideration upon argument, which we have heard. The facts stated in the prior report will be repeated herein only to the extent necessary for a clear understanding of the issues.

party herein and the Court having considered said motion and the pleadings tendered therewith, and it appearing to the Court that the said American Waterways Operators, Inc. should be permitted to intervene as prayed, and the Court being duly advised in the premises,

It is ordered, that the American Waterways Operators, Inc. have leave to intervene in this cause and is hereby made a party to this cause and to that end may file a pleading in this cause in the same manner and with like effect as if named an original party to this cause. Subject to all legal objections.

(S.) Ben C. Connally, Judge.

11/3/54

[fol. 68] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

ANSWER OF INTERVENOR IN OPPOSITION TO THE ORDER OF THE INTERSTATE COMMERCE—COMMISSION—November 3, 1954

Now comes the Intervenor, the American Waterways Operators, Inc. and in support of the complaint and in opposition to the Order of the Interstate Commerce Commission states as follows:

1. That the American Waterways Operators, Inc. is a Delaware corporation which, under its Constitution and By-Laws has for its general purpose, the advancement of the general welfare of operators of small vessels throughout the United States.

2. That all the Plaintiffs in the instant proceeding are members of the American Waterways Operators, Inc. and at the request of Plaintiffs, the American Waterways Operators, Inc. intervened in and became a party to the complaint proceeding before the Interstate Commerce Commission upon leave duly granted by said Interstate Commerce Commission.

3. That the question of law involved in the instant proceeding, namely, the proper interpretation of Section 3(4)

[fol. 39] Single-line rail service is provided by defendants from East St. Louis to Danville, and they participate with other defendant rail carriers in joint-line rail service for the transportation of sulphur from Galveston, Tex., to Danville. Beginning with and since 1951, the entire movement of sulphur from the Galveston area, approximating 20,000 tons a year, has been over the all-rail routes. The all-rail rate from Galveston is $9.184 per ton.[1] The combination barge-rail rate from Galveston is $8.27, composed of $5.32 by barge to East St. Louis, minimum 1,500 gross tons, and the rate of $2.95 by rail from East St. Louis to Danville. The complainants suggest a joint barge-rail rate of $7.67 from Galveston, which is based upon a joint barge-rail rate of $6.66 from Port Sulphur, La., to Danville, plus $1.01, the usual difference between rates by barge from Galveston and from Louisiana ports. The barge lines would absorb the charges incident to the transfer to rail cars at East St. Louis.

As was found by the division, the record affords no support for a finding that the present combination barge-rail rate, 91.4 cents lower than the present all-rail rate, is unreasonable for the through service offered thereunder. There also is no evidence affording a basis for a conclusion that the proposed difference of $1,514 between the present all-rail rate from Galveston and the suggested barge-rail rate from Galveston, or any particular differential, is required to remove the alleged discrimination against barge lines and to result in rates that would be consistent with the national transportation policy to preserve the inherent ad-[fol. 40] vantages of all modes of transportation. The complainants cite decisions in which such rate differences were prescribed, but the prescriptions were based upon a presentation of adequate evidence, which is not the case here.

The circumstances here, insofar as the establishment of a joint barge-rail rate is concerned, are in all respects similar to those in *Hanaquin-Missouri Chemical Corp. v. A. T. & S. F. Ry. Co.*, 286 I. C. C. 307, wherein division 3 found that the establishment of a joint rate and through route as

[1] Rates and rate differences stated herein are per ton of 2,240 pounds.

[fol. 69] of the Interstate Commerce Act, as amended is of interest to and concerns the general welfare of all of Intervenor's members which are operators of small vessels throughout the United States and which consist of approximately 210 in number.

4. That the interpretation placed by the Interstate Commerce Commission on Section 3(4) of the Interstate Commerce Act, as amended, is clearly erroneous and adversely affects the welfare of all members of your Intervenor, that if the interpretation based upon the aforesaid section by the Interstate Commerce Commission should prevail, all members of your Intervenor would be most seriously and adversely affected to the extent of, in all probability, driving out said water carriers from the business of transportation of property by water throughout the United States, which would be clearly inequitable. Finally, that unless the action of the Interstate Commerce Commission as taken in their report and order in the complaint case referred to herein is reversed by this honorable Court, Intervenors' members would be without any remedy whatsoever.

Wherefore, Intervenor respectfully prays that upon the final hearing of this action, the Court so constituted enter a decree permanently suspending, enjoining, setting aside and annulling the said orders of said Commission; that this Court construe the statutes involved and determine and state the correct principles of law controlling the disposition of said complaint before the Commission, and determine the jurisdiction of the Commission in the premises; and that this Court thereupon remand said complaint to the Commission for further proceedings in accordance with the controlling principles determined by this Court, or find and determine that plaintiffs are entitled to further [fol. 70] consideration of their complaint before the Commission by the Commission and a decision thereon not inconsistent with the decision of this Court;

That plaintiffs have such other and further relief in the premises as may be lawful and as may be deemed by this Court to be fit and proper.

John H. Eisenhart, Jr., 1319 F Street, N. W., Washington 4, D. C.; E. V. Greenwood, Second National Bank Building, Houston 2, Texas, Attorneys for Intervenor:

there sought on sulphur from Port Sulphur, La., to De Sota, Kans., was not shown to be necessary or desirable in the public interest. The complainants there were the Inland Waterways Corporation, operating the Federal Barge Lines, and a shipper or receiver located at De Sota. Here, no shipper has evidenced an interest in the rate sought, and the rate over the all-rail route which it is intended to meet is on a depressed basis. In these circumstances, we cannot find that the public interest requires the establishment of the joint barge-rail rate sought.

At the oral argument counsel for complainants agreed that one way the alleged discrimination could be removed would be by the use of $2.26 as a proportional rate for the services of the defendants operating from East St. Louis to Danville, which is the amount received by them as a division of the joint barge-rail rate of $6.66 from Port Sulphur to Danville. He stated, however, that he did not believe that that was one of the issues of their complaint. This belief appears to be correct. The complaint in this respect is directed against the alleged discrimination in favor of rail lines serving Galveston and not Port Sulphur, and what the rail lines receive as their share of the rate from Port Sulphur is not helpful here. The amount received by the East St. Louis-Danville lines in the division of the all-rail [fol. 41] rate from Galveston is not shown, but even if it were shown, we do not think a finding of unlawful discrimination under section 3(4) could be supported on the facts presented. The claim here is, not that the complainants are discriminated against in the matter of divisions of joint rates, as was the case in *Western Pacific R. Co.* v. *Southern Pac. Co.*, 55 I. C. C. 71, referred to by the complainants, nor that the separately established rate paid by the shipper as one of the components of a combination rate is greater for the transportation of ex-barge traffic than for ex-rail traffic, which was the situation in *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, also cited by the complainants, but that the separately established rate paid by the shipper on ex-barge traffic beyond East St. Louis is greater than the unpublished division of a joint through all-rail rate received by the rail carriers for the transportation beyond East St. Louis on ex-rail traffic moving from the

same origin to the same destination. The comparison is between a rate or charge paid by a shipper and a division of a joint rate received by rail carriers, and is of unlike things. Basically divisions of joint rates are the result of contractual arrangements between carriers; they are not "rates" or "charges" as those terms are used in section 3(4) of the act. A seemingly contrary opinion expressed in *Western Pacific R. Co.* v. *Southern Pac. Co., supra*, upon which the complainants rely, was made, as above indicated, under circumstances different from those now before us, and is not controlling here.

The rail rate of $2.95 from East St. Louis to Danville, used as a component of the through combination barge-rail rate on complainants' traffic from Galveston to Danville, is also used for similar application on sulphur carried from [fol. 42] Galveston to East St. Louis by contract carriers by barge. It will also apply on sulphur moved to East St. Louis by rail carriers not parties to joint rates. The depressed character of this rate, originally established under intermediate application under the fourth section when the rail lines reduced their rate from East St. Louis to Joliet, Ill., to meet barge competition, as shown by its comparison with noncompetitive rail rates of from $4.70 to $5.80 for lesser hauls in the same general area. A proposal of defendants to further reduce the application of the same rate on traffic to Joliet, in an effort to meet further competition of the barge lines, was suspended upon protest of the barge lines, and was found not shown to be just and reasonable by division 2 in *Crude Sulphur From East St. Louis To Joliet*, 270 I. C. C. 231. Had that rate been permitted to become effective the rate from East St. Louis to Danville would now be approximately the same as the rail division of the Port Sulphur-Danville joint rate, but such a rate would then have been available to the traffic of all carriers not parties to joint rates, including traffic moved into East St. Louis by contract carriers by barge. Complainants show that their fully distributed cost for hauling sulphur by water for 1500 miles, the approximate water distance from Galveston to East St. Louis, is $4.03 per gross ton. Their witness estimated that it costs the barge lines about 29 cents to deliver the traffic to the rail lines at East St.

originating at New Gulf that may move from Galveston to East St. Louis by barge, although they receive a division, which it must be assumed is less than $2.95, of the joint all-rail rate on traffic for the same destination moving from New Gulf to East St. Louis by rail. Such a difference between the amounts received or demanded for the transportation beyond East St. Louis could have justification only if a substantial difference in the amount or character of the service beyond East St. Louis were shown. No such a showing has here been made. The evidence is to the contrary.

Section 3(4) of the act, among other things, prohibits carriers subject to part I of the act from discriminating "in their rates, fares, and charges between connecting lines," and the term "connecting lines" is therein defined as including common carriers by water subject to part III of the act. Complainants here are such common carriers. As stated in *Western Pacific R. Co.* v. *Southern Pac. Co.*, 55 I. C. C. 71, 81, "Wherever and whenever the discrimination is practiced as between carriers and connections in cases with respect to which the service is rendered under the same circumstances and conditions, unlawful results follow." The Commission there found, at page 73, that "The expression of rates and charges in the form of divisions makes them none the less rates and charges which may be discriminatory." That finding was a necessary preliminary to the conclusion therein reached that complainant was being discriminated against by defendants in the matter of divisions of joint rates, in violation of provisions of the act [fols. 45-51] similar to those now in section 3(4). If divisions of joint rates were a "charge" under the law as it stood then, they must be a "charge" under the law as it stands today.

To my mind it is obvious that the complaining barge lines are being subjected to unlawful discrimination in and to the extent that the defendants operating from East St. Louis to Danville make a greater charge as compensation for their services when the transportation of this sulphur is by barge from Galveston to East St. Louis than they receive for such services when the transportation is by rail from New Gulf to East St. Louis.

[fol. 54] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed June 18, 1954

The Interstate Commerce Commission, one of the defendants in the above-entitled cause, hereinafter called the Commission, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the complaint contained, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering the allegations of paragraphs 1 to 8, inclusive, of plaintiffs' complaint, the Commission admits the same.

II

Answering the allegations of paragraph 9 of the complaint, the Commission admits the filing by plaintiffs of the complaint in the Commission proceedings as alleged in paragraph 9 and that what appears to be a true copy thereof is [fol. 55] attached to their complaint in the court proceedings as Exhibit A.

III

Answering the allegations of paragraph 10 of the complaint, the Commission admits that the railroads named in said paragraph were designated as defendants in the complaint filed in the Commission proceedings. However, the Court is respectfully referred to said complaint (Exhibit A to plaintiffs' complaint herein) for full, true, and accurate information as to the allegations contained therein. The Commission admits that answers were duly filed by the railroad defendants named in said complaint.

IV

Answering the allegations of paragraph 11 of the complaint, the Commission admits that a hearing was had before one of its examiners and that said examiner issued his proposed report, which is attached to the complaint herein, containing recommended findings, to which the Court is respectfully referred for a more complete description of the findings recommended therein.

V

Answering paragraph 12 of the complaint, the Commission admits the same.

VI

Answering paragraph 13 of the complaint, the Commission admits that evidence was taken at the hearings before the Commission in regard to the issues raised by plaintiffs in their complaint, but the allegations as to what the evidence showed, the Commission avers, are argumentative, and it is not required to make answer thereunto. However, the Commission alleges that its report and order here under attack are supported by the evidence taken in the hearings referred to in said paragraph 13.

[fols. 56-57] VII

Answering the allegations of paragraph 14 of the complaint, the Commission denies that its report and order herein are either capricious, arbitrary, erroneous, without rational basis, beyond its power to make or in violation of any statute referred to in said paragraph and should be set aside for any of the reasons stated therein or for any other reason or reasons.

VIII

Answering paragraph 15 of the complaint, the Commission denies that its report and order herein subject plaintiffs to irreparable loss or damage or any other kind of loss or damage, and it is further denied that the Commission's decision will bring about any "disastrous effects" upon plaintiffs' operations.

Except as herein expressly admitted, the Commission de-

II

Deny that the matter was argued orally before Division 3 of the Commission, as alleged in Paragraph 12 of the complaint.

III

Deny each and every allegation of Paragraphs 13, 14 and 15 of the complaint.

[fol. 61] And Intervenors further state:

IV

That the final order of the Interstate Commerce Commission was within the power of the Commission to enter, that the order is well supported in fact and at law and that the order is wholly consistent with the National Transportation Policy.

Wherefore, defendants respectfully pray that the order of the Interstate Commerce Commission be sustained, and that plaintiffs take nothing by their suit.

John A. Daily, 1225 LaSalle Street Station, Chicago 5, Illinois; Palmer Hutcheson, Jr., Hutcheson, Taliaferro & Hutcheson, 1720 Niels Esperson Building, Houston, Texas, Attorneys for Intervenors, The New York Central Railroad Company, Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad Company, and Wabash Railroad Company.

[fol. 62-64] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

ORDER ALLOWING INTERVENTION—June 22, 1954

This cause coming on to be heard on the motion of The New York Central Railroad Company, Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad

[fol. 71] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Civil Action No. 8171

DIXIE CARRIERS, INC., COYLE LINES INCORPORATED, AMERICAN BARGE LINE COMPANY, Federal Barge Lines, Inc., Plaintiffs,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMERCE COMMISSION, Defendants

THE NEW YORK CENTRAL RAILROAD COMPANY, CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, Illinois Terminal Railroad Company, and Wabash Railroad Company, Intervening Defendants.

Donald Macleay (Macleay and Lynch), of Washington, D. C.; for Plaintiffs Dixie Carriers, Inc., and Coyle Lines Incorporated.

Richard J. Hardy and Nuel D. Belnap (Belnap and McAuliffe), of Chicago, Illinois; for Plaintiffs American Barge Line Company and Federal Barge Lines, Inc.

[fol. 72] E. V. Greenwood (Fulbright, Crooker, Freeman, Bates & Jaworski) of Houston, Texas; for all Plaintiffs.

Stanley N. Barnes, Asst. Atty. Gen., of Washington, D.C. and Malcolm R. Wilkey, U.S. Atty., of Houston, Texas, and Edward M. Reidy, Chief Counsel, of Washington, D.C., and Samuel R. Howell, Asst. Chief Counsel and Leo H. Pou, of Washington D.C.; for Defendants the United States of America and the Interstate Commerce Commission.

John A. Daily, of Chicago, Illinois, and Palmer Hutcheson, Jr. (Hutcheson, Taliaferro & Hutcheson) of Houston, Texas; for Intervenors, New York Central Railroad Company, Chicago and Eastern Illinois Terminal Railroad Company, and Wabash Railroad Company.

E. V. Greenwood (Fulbright, Crooker, Freeman, Bates and Jaworski) of Houston, Texas, and John H. Eisenhard, Jr., of Washington, D.C.; for Intervening Plaintiff American Waterways Operators, Inc.

Before HUTCHESON, Chief Circuit Judge, and CONNALLY and KENNERLY, District Judges.

KENNERLY, District Judge:

This is a suit by Plaintiffs, Dixie Carriers, Inc., Coyle [fol. 73] Lines Incorporated, American Barge Line Company and Federal Barge Lines, Inc., against the Interstate Commerce Commission (for brevity called Commission) and the United States of America, Defendants. The New York Central Railroad Company, the Chicago and Eastern Illinois Railroad Company, the Illinois Terminal Railroad Company and the Wabash Railroad Company have intervened on the side of Defendants and are referred to as Intervening Defendants. The American Waterways Operators, Inc., have also intervened on the side of Plaintiffs and are referred to as Intervening Plaintiffs. The trial was before a three-judge-court convened under sections 2284 and 2325 of Title 28, U.S.C.A.

Plaintiffs moving under the Interstate Commerce Act, as amended by the Transportation Act of 1940 respecting water carriers (49 U.S.C.A., Secs. 901 et seq.) complain of and seek to enjoin, set aside and annul an order of the Commission with respect to rail rates, barge rates and rail-barge rates on sulphur from sulphur mines in Texas and approximately 60 miles from Galveston, Texas, but described as being in the Galveston area, through East St. Louis, Illinois, to Danville, Illinois. Specifically, Plaintiffs sought in their application before the Commission to have established a through barge-rail route and a joint through barge-rail rate for sulphur from Galveston, Texas, to Danville, Illinois, via East St. Louis, i.e. by barge from Galveston to East St. Louis, and by rail from East St. Louis to Danville. [fol. 74] Plaintiffs claimed that the establishment of such route and rate was necessary and desirable in the public interest and that the failure and refusal to establish same discriminated against them as connecting carriers. The order complained of which denied Plaintiffs' application to the Commission was entered in a proceeding before the

Commission entitled American Barge Line Company, et al., v. Chicago & Eastern Railroad Company, et al. (I.C.C. Docket No. 30731, reported in 287 I.C.C. 403 and 291 I.C.C. 422.)

Among the several persons who were parties to, intervened in or took part in the hearings before the Commission there were no shippers nor consumers of sulphur. There was one intervenor, the American Waterways Operators, Inc., who appeared on behalf of the "inland water carriers generally throughout the United States", and the Galveston Chamber of Commerce, intervened, was represented at the hearings, but did not otherwise participate in the proceedings. But no one purported to participate in the proceedings on behalf of or in the interest of the public generally.

The facts are not greatly if at all in dispute, and are fully shown by the Record. They may be briefly summarized substantially as follows:

(a) Plaintiffs here, who were the complainants in the proceeding before the Commission, are common carriers by water, operating under certificates of public convenience and necessity issued by the Commission. The American [fol. 75] Barge Line Company and the Inland Waterways Corporation, operating Federal Barge Lines, render common carrier barge service on the Mississippi River between (among others) Port Sulphur (near New Orleans, Louisiana) and New Orleans, Louisiana on the one hand, and East St. Louis, Illinois, on the other hand, a distance of approximately 1,049 miles. The Coyle Lines, Incorporated, and Dixie Carriers, Inc., render common carrier barge service from Galveston, Texas, to New Orleans, Louisiana, a distance of approximately 357 miles. Each of the Intervening Defendants operate rail lines from East St. Louis, Illinois, to Danville, Illinois, a distance of approximately 184 miles. The Intervening Plaintiff, the American Waterways Operators, Inc., is here because of its interest in the legal questions involved.

(b) The volume of sulphur movement from the mines in Texas to Danville, Illinois, is approximately 20,000 tons a year. During the last six months of 1950, the preponderance of the sulphur traffic from Galveston to Danville moved by rail to Galveston, by barge to East St. Louis, and by rail

beyond. That movement, however, was by a contract water carrier which has since discontinued operation. Thereafter the sulphur moved from the mines, not through Galveston nor over Plaintiffs' lines, but on a joint through rate over an all-rail route, i. e. from the mines over the lines of the Texas and New Orleans Railroad Company directly to Shreveport, Louisiana, the Texas and Pacific Railway Company to Texarkana, Arkansas, the Missouri-Pacific Railroad Company (Guy A. Thompson, trustee) to East St. Louis, and the Wabash Railroad Company to Danville. The distance over that route from the sulphur mines is approximately 850 miles to East St. Louis, and is approximately 184 miles from East St. Louis to Danville, making a total distance of 1,034 miles from the sulphur mines to Danville. As stated, the sulphur mines are in the Galveston area, but the distance from them to the port of Galveston is approximately 60 miles.

(c) The all rail joint through rate on sulphur (Galveston rate) from the sulphur mines to Danville is $9.184 per ton. The Commission found these rates to be on a "depressed basis" in that the combination local rates which would apply in the absence of such joint through rate is $11.686 or $2.502 higher than such joint rates. Such combination local rates are made up of rates of $8.736 from the mines to East St. Louis, and a local rate of $2.95 from East St. Louis to Danville.

(d) There are no joint barge-rail rates in effect either from the sulphur mines or from Galveston to Danville or [fol. 76] any other point,[1] The combination barge-rail rate on sulphur from Galveston to Danville is $8.27, composed of Plaintiffs' joint barge rate of $5.32 from Galveston to East St. Louis and Intervening Defendants' rail rate of $2.95 from East St. Louis to Danville. The combination rate of $8.27 does not include unloading and loading and switching charges, etc., at East St. Louis. However, barge lines absorb, or are willing to absorb such charges at East St. Louis. Such charges are for unloading the barges 44 cents a ton, the switching charges are approximately 30

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[1] See Thompson v. United States, 343 U. S. 558, for a discussion of through routes, etc.

cents a ton, and other charges are approximately 15 cents a ton.

The price of sulphur at Galveston is $1.50 a ton higher when loaded in barges than when loaded in rail cars 60 miles away at the mines. The higher price reflects in part the rail rate of $1.20 per ton from the mines to Galveston, 11 cents for wharfage, 37 cents for unloading from cars to storage bins, 22 cents for transfer from bins to barges, 4.55 cents for stevedoring, and 1.41 cents for pier rental. Such combination rate does not include and the barge lines do not absorb this Galveston item of $1.50 per ton.

(c) Complainants proposed and were refused the establishment of a joint through route and a joint through barge-rail rate of $7.57 for sulphur, not from the sulphur mines but from Galveston to Danville, to be divided $5.41 for the barges lines from Galveston to East St. Louis, and $2.26 for the rail lines from East St. Louis to Danville. The rate was arrived at by adding $1.01 to the Port Sulphur to Danville rate of $6.66. This proposal contemplated that the barge lines would absorb the charge mentioned at East St. Louis but there was no such commitment respecting the $1.50 charge mentioned at Galveston.

1. The case involves a construction of the Interstate Commerce Act as amended by the Act of 1940 respecting water carriers (49 U.S.C.A., Secs. 901, et seq.). Plaintiffs claimed before the Commission and claim here that under such Act the combination rates and charges on sulphur over barge-rail route from Galveston, Texas, through East St. Louis, Illinois to Danville, Illinois, were unreasonable, that they [fol. 77] discriminated against Plaintiffs, and that the public interest required that a through barge-rail route and joint through barge-rail rates be established with reasonable differentials, etc.

The Commission, after a full hearing (Reports of December 22, 1952, and January 19, 1954) dismissed Plaintiffs' complaint.

Defendants' first contention here is that the findings and

conclusions of the Commission are fully supported by the evidence, that its findings are adequate and in full accord with the Act and that its Order should not be set aside here. We agree that this is true.

Congress has with wholesome care clothed the Commission with the power and made it its duty after, as here, a full hearing to determine when existing rates are discriminatory, where and under what circumstances through routes and through rates should be established, etc. The Commission is given wide discretion and when its findings and conclusions are, as here, supported by the evidence and in accordance with the Act they will not be disturbed by the courts. Alabama Great Southern R.R. Co. v. United States, 340 U. S. 216; Capital Transit Co. v. United States, 97 F. Supp. 614; Interstates Commerce Commission v. Mechling, 330 U. S. 567; McLean Trucking Co. v. United States, 321 U. S. 67; Mississippi Valley Barge Line v. United States, 292 U. S. 282; United States v. Pierce Auto Freight Lines, Inc., 327 U. S. 515; Interstate Commerce Commission v. United Pacific R.R., 222 P. S. 541; Virginia Ry. Co. v. [fol. 78] United States, 272 U. S. 568; Western Pacific Chemical Co. v. United States, 271 U. S. 268; Ayrshire Corporation v. United States, 335 U. S. 573.

2. We have, however, independently of the conclusions reached by the Commission, considered the Record and reached substantially the same conclusion.

As we have pointed out, the Commission in determining the questions was required and we are required to consider not only Plaintiffs' desire for and interest in a through barge-rail route and through joint rate, but the effect thereof if established upon all others concerned. This rule is well stated in Ayrshire Corporation v. United States, 335 U. S. 573, where in considering the rates for the transportation of coal, it is said:

> "Rate structures are not designed merely to favor the revenues of producers and carriers. The Commission has the consumer interest to safeguard as well. And when it undertakes to rationalize the interests of

the three, great complexities are often encountered." etc.

The Commission doubtless had in mind this rule when it considered, as we have, the effect of the establishment of the proposed through route and joint rate.[2]

We also attach importance to the fact, as did the Commission, that only Plaintiffs and one Intervenor took part in the proceedings before the Commission, and only Plaintiffs and such Intervenor are here seeking the establishment [fol. 79] of such route and rates. No shipper nor consumer of sulphur nor other person is making common cause with Plaintiffs.[3]

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[2] The Commission says:

"In reaching our conclusions herein we are not unmindful of the provisions of the national transportation policy which call for fair and impartial regulation of all modes of transportation subject to the act, so administered as to recognize and preserve the inherent advantages of each. We do not believe, however, that this policy requires us to force rail carriers, where they maintain a depressed rate to meet water competition to further depress their earnings on the traffic in order to favor the same form of competition. Danville is 184 miles from the end of the barge-line service, and the rail rate for the 184-mile haul is depressed at least from 13.5 to 9.2 percent of first class. If the barge lines can reasonably be expected to participate in this movement, the opportunity to do so should be afforded, not by the establishment of a through barge-rail rate differentially under an all-rail adjustment which is already severely depressed, but by a reduction in the barge rate from Galveston to East St. Louis, or by an increase in the depressed rail rate, or both. There is no allegation here that the all-rail rate, or any factor thereof, is unreasonably low." (Com. 1st Report, p. 407.)

[3] The Commission says:

"As stated, no shipper has evidenced an interest in the establishment of the rate sought, and the rate over the all-

[fol. 80] We also point to the route which shipments of sulphur would follow in Plaintiffs' suggested through barge-rail route and through joint rate, i.e. by barge from Galveston to East St. Louis and by rail from East St. Louis to Danville, with no provision made for the $1.50 per ton cost and expense of transportation from the sulphur mines to Galveston and of loading, unloading, etc. there. While Plaintiffs are willing to absorb charges of loading, unloading, etc., at East St. Louis, there is nothing to indicate that they are willing to absorb such Galveston charges.

Also, the Commission and we have compared the proposed joint barge-rail rate and the movement of sulphur thereunder with the other rates discussed herein, and the movement of sulphur thereunder. Although it is mandatory that the Act must be so administered as to recognize and preserve the inherent advantages of all modes of transportation, including water transportation, we discover here no violation or deviation from this rule. There is nothing in the record indicating that the refusal of the Commission to grant Plaintiffs' request or to approve the route and rate requested by Plaintiffs failed to preserve the advantages and rights of all parties. When the whole record is considered in the light of all the provisions of the Act and many cases construing same, we think Plaintiffs have not shown their claim of discrimination to be meritorious. Nor is there merit in Plaintiffs' claim that [fol. 81] the establishment of the proposed through route and joint through rate is in the public interest. Federal Power Commission v. Hope Natural Gas Co., 320 U. S. 591; Interstate Commerce Commission v. City of Jersey City, 322 U. S. 503; Interstate Commerce Commission v. Mechling, supra; Thompson v. United States, 343 U. S. 549; United States v. Great Northern Ry. Co., 343 U. S. 562.

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rail route which it is intended to meet is on a depressed basis. The defendants urge that their participation in barge-rail routes, as desired by complainants, is not shown to be necessary or desirable in the public interest." (Com. 1st Report, p. 406.)

3. Plaintiffs strongly press upon us the decision of the Supreme Court in the Mechling case (I.C.C. v. Mechling, supra). That Court there uses this language:

> "Judicial review of the findings of fact and the expert judgments of the Interstate Commerce Commission where the Commission acts within its statutory authority is extremely limited. And § 307(d) of the 1940 Act authorizes the Commission 'in the case of a through route' to 'prescribe such reasonable differentials as it may find to be justified' between all-rail rates and the joint rates in connection with such common carrier by water.' Cf. United States v. Chicago Heights Trucking Co., 310 U. S. 344, 352-353; Board of Trade of Kansas City v. United States, 314 U. S. 534, 546. But the congressional debates and committee reports on the 1940 Act and the statutory provisions which emerged from this legislative background show that Congress enunciated positive policies and specific limiting standards which it expected the Commission to follow in fixing rates, including 'differentials' between all-rail and water-rail rates. The provisions of the Transportation Act of 1940 which brought water carriers under Interstate Commerce Commission jurisdiction were vigorously opposed in Congress by those who feared that the Commission might raise barge rates in order to enable railroads better to compete with inherently cheaper water transportation. These opponents were repeatedly assured by sponsors of the 1940 Act who advocated Commission regulation of water transportation that the questioned legislation unequivocally required the Commission to fix rates which would preserve for shippers [fol. 82] the inherent advantages of barge transportation: lower cost of equipment, operation, and therefore service." etc.

It then held that under the facts in that case the Order of the Commission should not be permitted to stand because

not based on adequate findings and evidence. But the facts there greatly differ from the facts here. Here, as has been pointed out, there is neither a showing that Plaintiffs' suggested route and rate is in the public interest, nor that it is fair to shippers, consumers and the public generally. Neither have Plaintiffs shown that the existing rates discriminate against them.

The case of Alabama Great Southern R.R. Co. v. United States (supra) was one where, as here, the Commission was called upon to establish through routes and joint through rates, and where the Court citing the Ayrshire case points out that the Commission has to safeguard the interest of the shipper and consumer as well as those of the carrier, etc. In speaking of the Mechling case, the Court uses this language:

> "Appellants also contend that the prescription of differentials in this proceeding deprives them of their inherent advantages contrary to the National Transportation Policy. They point to I.C.C. v. Mechling, 330 U. S. 567, as having established the principle that the lower costs of the barge carrier there involved was an inherent advantage, and that the Commission had no discretion to approve a rate structure which would reduce such advantage. They argue that the 'fair and impartial regulation' called for by the National Transportation Policy demands that the rule of the Mechling case be applied impartially to protect the 'inherent [fol. 83] advantage' of the rail carriers here.
>
> 'In the Mechling case, the Commission had fixed a rate for transportation of wheat east by rail from Chicago at a rate higher if it arrived in Chicago by barge than if by rail or lake. This was a plain case of discrimination. There were different rates provided for equal service without any showing that any additional service was rendered for the additional charge. Here the question is whether the barge lines may charge less than the railroads for the different service they render. There is no unlawful discrimination here as

there was in the Mechling case. The differentials providing a lower rate for barge service do not constitute an 'unjust discrimination' by express proviso of § 305(c) of the Act. 54 Stat. 935, 49 U.S.C. § 905(c)."

We believe the Mechling case is not controlling here.

From what has been said it follows that judgment should be and is entered here for Defendants. Let appropriate decree be drawn and presented.

The clerk will file this opinion.

——, Judge.

[fol. 84] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Civil Action No. 8171

DIXIE CARRIERS, INC., et al., Plaintiffs

v.

UNITED STATES OF AMERICA, et al., Defendants

JUDGMENT—February 16, 1955

This action having come on for final hearing on November 15, 1954, before a duly constituted three-judge District Court convened pursuant to Sections 2284 and 2325, Title 28, United States Code, consisting of the undersigned judges; and the Court having considered the pleadings and evidence, and the briefs and arguments of counsel for the respective parties, and being fully advised in the premises; and having on January 3, 1955, filed its opinion herein, containing its findings of fact and conclusions of law; now, in accordance with the said opinion, findings, and conclusions, it is hereby

Ordered, adjudged, and decreed that the relief prayed

for by the plaintiffs be, and the same hereby is, denied, and their complaint be, and the same hereby is, dismissed.

This the 16 day of February, 1955.

J. C. Hutcheson, Jr., Chief Judge, United States Court of Appeals for the Fifth Circuit; Ben C. Connally, United States District Judge;
not legible, United States District Judge.

[fols. 85-86] Approval of Form of Judgment

The undersigned, as attorneys of record for the respective parties to this action, hereby indicate their approval of the form of the annexed and foregoing judgment.

Macleay and Lynch, by Francis W. McIninv, Attorney for Dixie Carriers, Inc., and Coyle Lines, Incorporated, Plaintiffs; Nuel D. Belnap, Attorney for American Barge Line Company and Federal Barge Lines, Inc., Plaintiffs; Gordon Deace, Asst. United States Attorney, Attorney for the United States of America, Defendant; Leo A. Pons, Attorney for the Interstate Commerce Commission, Defendant; John A. Daily, Palmer Hutcheson, Jr., Attorneys for Intervening Railroads, Defendants.

[fol. 87] In the United States District Court for the Southern District of Texas, Houston Division

[Title omitted]

Motion for New Trial and to Amend Findings of Fact and Conclusions of Law—Filed February 16, 1955

The plaintiffs move the Court: (1) To set aside the findings of fact and conclusions of law and judgment entered herein, and to grant plaintiffs a new trial, (2) to amend its findings of fact and conclusions of law, heretofore filed, as more fully set out hereinafter.

[fol. 88] This motion is made on the grounds that the opinion filed by the Court in this case is not responsive to the issues presented to the Court for consideration, and that the Court erred in failing to pass upon the issue raised by

the pleadings, and in passing, instead, upon issues which were not presented to the Court for review.

The simple issue presented to the Court in this proceeding is whether or not the Commission correctly construed section 3(4) of the Interstate Commerce Act. As applied to the facts of the case, the issue is whether that section of the Interstate Commerce Act makes it unlawful for the intervening defendants to discriminate against the plaintiffs by charging *more* to transport sulphur from East St. Louis to Danville if it is delivered to them by a connecting water line than they charge for the identical service if it is delivered to them by a connecting rail line. The intervening defendants accomplished the discrimination by joining in the publication of through rates with their rail connections, and accepting as their share of the rate a secret contractual "division", which they have acknowledged is less than the "local" rate for the same services, while refusing to similarly join with plaintiffs; their connecting water lines; in the same type of arrangement. The facts are undisputed.

Plaintiffs sought the review of the Commission's decision *only* because it held *as a matter of law* that divisions of through rates are *not* charges within the meaning of the section cited, stating on that point:

> "Basically divisions of joint rates are the result of contractual arrangements between carriers; they are not 'rates' or 'charges' as those terms are used in section 3(4) of the Act."

The Commission also considered questions under other sections of the Act as to the reasonableness of the rates, and the public interest therein, but the plaintiffs have asked review only of the Commission's ruling on the question of discrimination, as was specifically stated on page 5 of their [fol. 89] brief, i.e., ". . . the plaintiffs allege error within the scope of judicial review only as to disposition by the Commission of the issue of section 3(4) . . . ." If the plaintiffs are correct in their contention on the question of discrimination under that section, the rate in question is unlawful without regard to public interest or reasonableness, the decision of the Commission must be set aside, and the case remanded.

The opinion of the Court, as well as its findings and conclusions, relate almost entirely to questions of reasonable-

ness and public interest, which are not here in issue. Plaintiffs submit that the question of discrimination under section 3(4) of the Act did not receive adequate, if indeed it received any, consideration.

Findings of Fact and Conclusions of Law

(1) Plaintiffs appreciate the purpose of the Court to state accurately the contentions of the plaintiffs and the basis therefor, and that any inaccuracies as to such matters in the opinion are necessarily due to the failure of the plaintiffs to make such matters clear. Plaintiff's contentions, and the basis for the Commission's report and order which the Court is asked to review, are correctly stated as follows:

(a) Plaintiff claimed before the Commission that the combination rates and charges over barge-rail routes from Galveston, Texas, via East St. Louis to Danville, Illinois, are unreasonable, and that the public interest required that through barge-rail routes and joint through barge-rail rates be established with reasonable differentials, etc. The Commission held that the plaintiffs had not sustained such claims. However, the plaintiffs ask no review of that portion of the Commission's report and order in the instant case.

(b) Plaintiffs further claimed before the Commission, and *claim here*, that the action of the intervening [fol. 90] defendants in accepting less for the service performed by them in the transportation of sulphur to Danville when received from rail connections than when received from plaintiffs, constitutes discrimination in charges between connecting lines in violation of section 3(4) of the Interstate Commerce Act. Plaintiffs also claimed before the Commission, *and claim here*, that section 3(4) is violated when the intervening defendants, without just cause, refuse to make a joint rate with the plaintiffs upon as favorable a basis as with their rail connections. The Commission also ruled against the plaintiffs as to these matters.

(2) The Court is requested to enter the following additional findings of fact:

(a) On sulphur from Galveston delivered to intervening defendants at East St. Louis by plaintiffs for trans-

portation to Danville, the intervening defendants demand and collect their full local rate of $2.95 per gross ton. While the evidence before the Commission does not show the precise amount which the intervening defendants collect, under their contracts with their rail connecting lines, as their compensation for the same service on sulphur moving on the $9.184 per gross ton all-rail joint rate from Galveston and points in the Galveston area to Danville, it does establish that such amount is *less* than $2.95.

(b) There was no evidence before the Commission to show, nor did the intervening defendants contend, that the services required or the costs incurred by them in transporting to Danville sulphur received from rail connecting lines at East St. Louis were less or different from the services required or the costs incurred by them in transporting to Danville sulphur received from barge connecting lines at East St. Louis.

[fol. 91] (3) Plaintiffs further suggest that there be eliminated from the findings all references to the $1.50 per gross ton difference in selling price of surphur, dependent on whether sulphur is loaded into barges at Galveston or loaded into rail cars at mines in the same origin rate group as Galveston, and the findings relating to the local rail movement from the mines to Galveston, as being not pertinent to the issue of the case.

(4) Upon a consideration of the narrow question of law as to which the plaintiffs contend the Commission erred, the Court is requested to enter the following conclusions:

(a) The issues which the Commission was called upon to decide under section 3(4) were, first, whether there is a different "rate" or "charge" between connecting lines within the meaning of the section and, secondly, if such a difference exists, whether the circumstances surrounding plaintiffs and their traffic are so dissimilar from those surrounding the connecting lines and their traffic as to justify the difference in charges. The decision of the Commission as to the section 3(4) phase of plaintiffs' complaint rests squarely on a holding against the plaintiffs as to the first issue. The determination of that issue by the Commission and here under review by the Court is

not affected by nor related to matters of reasonableness of rates or of public interest in through routes and joint rates.

(b) The Interstate Commerce Commission erred when it held that a division of a joint rate which is assessed on traffic received from one connecting line, and a highly local rate which is assessed on traffic received from another connecting line, are not both "charges" as between connecting lines, within the meaning of section 3(4) of the Act.

(c) The Interstate Commerce Commission erred as a matter of law when it failed to hold that section 3(4) [fols. 92-106a] prohibits a carrier from refusing, without just cause, to join with one connecting line in as favorable a joint rate arrangement as that in which it joins with other connecting lines.

Respectfully submitted, Donald Macleay, Commonwealth Building, Washington 6, D. C., Attorney for Plaintiffs Dixie Carriers, Inc., Coyle Lines Incorporated; Richard J. Hardy, Nuel D. Belnap, One North La Salle Street, Chicago 2, Illinois, Attorneys for Plaintiffs American Barge Line Company, Federal Barge Lines, Inc.; (S.) E. V. Greenwood, Second National Bank Building, Houston 2, Texas, Attorney for all Plaintiffs.

Of Counsel: Macleay and Lynch, Commonwealth Building, Washington 6, D. C.; Belnap & McAuliffe, One North La Salle Street, Chicago 2, Illinois; Fulbright, Crooker, Freeman, Bates and Jaworski, Second National Bank Building, Houston 2, Texas.

[fol. 107] IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

ORDER DENYING PLAINTIFFS' MOTION FOR NEW TRIAL, ETC.—March 28, 1955

Upon consideration of the plaintiff's motion for a new trial and to amend the findings of fact and conclusions of

through barge and rail routes and joint rates thereover and to maintain in connection therewith reasonable differential under the corresponding all-rail rates; and that said refusal of the defendants is discriminatory against complainants as connecting carriers, said discrimination being in favor of connecting carriers by railroad with whom said [fol. 23] defendants participate in the maintenance of through all-rail routes and joint rates thereover, and that the failure and refusal of the defendants to establish and maintain reasonable through routes and joint rates with complainants is in violation of Section 1 and 307(d) of the Interstate Commerce Act, and defendants are maintaining rates and charges which are discriminatory against complainants as connecting carriers in violation of Section 3(4) thereof.

Complainants may proceed.

Mr. Belnap: Call Mr. Hartmann.

J. G. HARTMANN was sworn and testified as follows:

Direct examination.

By Mr. Belnap:

Q. State your name.

A. My name is J. G. Hartmann. My address is 611 Gravier Street, New Orleans 12, Louisiana. I am assistant traffic manager of the Inland Waterways Corporation operating the Federal Barge Lines.

Q. Have you prepared a statement, Mr. Hartmann, and Company exhibits bearing upon the issues in this case?

A. I have.

Q. Please proceed with your statement.

A. I was connected with the Traffic Department of the Illinois Central Railroad and its subsidiaries from September, 1917, to July, 1926, at which time I joined the Traffic [fol. 24] Department of the Inland Waterways Corporation. I have served in the Traffic Department of this Corporation since that time in various capacities such as Chief of Tariff Bureau, Chief Rate Clerk, Assistant General Freight Agent, General Freight Agent and Assistant Traffic Man-

law heretofore made and entered herein, and upon consideration of the answers of the Interstate Commerce Commission, defendant, and the intervening defendants, to the said motion; and the Court being fully advised in the premises, and being of the opinion that the said motion should be denied; it is, therefore,

Ordered, adjudged, and decreed, that the plaintiff's motion for a new trial and to amend the findings of fact and conclusions of law, be, and the same hereby is, denied.

This the 28 day of March, 1955.

J. C. Hutcheson, Chief Judge, United States Court of Appeals for the Fifth Circuit; Ben C. Connally, United States District Judge; T. M. Kennerly, United States District Judge.

Filed 28 day of March, 1955, V. Bailey Thomas, Clerk, by Ruby Miller, Deputy.

[fols. 108-110] Approval of Form of Order

The undersigned, as attorneys of record for the respective parties to this action, hereby indicate their approval of the form of the annexed and foregoing order.

Nuel D. Belnap, Attorney for American Barge Line Company and Federal Barge Lines, Inc., Plaintiffs; Donald Macleay, Attorney for Dixie Carriers, Inc., and Coyle Lines Incorporated, Plaintiffs; ———, Ass't United States Attorney, Attorney for the United States of America, Defendant; Samuel R. Howell, Attorney for the Interstate Commerce Commission, Defendant; Leo H. Pou, Attorney for the Interstate Commerce Commission, Defendant; Palmer Hutcheson, Jr., John A. Daily, Attorneys for Intervening Railroads, Defendants.

[fol. 111] Clerk's certificate to foregoing transcript omitted in printing.

ager. I have held my present position since May 1, ..47. I have appeared before the Commission in numerous rate cases and I am familiar with the issues involved in the present proceedings.

The Inland Waterways Corporation, hereafter referred to as Federal, is a certificated common carrier and operates a barge service on the Mississippi River from Port Sulphur, Louisiana, to Minneapolis, Minnesota, on the Missouri River, from its confluence with the Mississippi River to Omaha, Nebraska, and on the Illinois Waterways from Grafton, Illinois, to Chicago, Illinois. It also operates service between New Orleans, Louisiana, and Port Birmingham, Alabama, through the Intracoastal Canal, Mississippi Sound, Mobile, Tombigbee, Warrior and Black Warrior Rivers.

Bulk sulphur has been handled in joint barge-rail service via East St. Louis, Illinois, since 1930, at which time the first joint barge-rail rate on sulphur subject to bargeload minima weights to East St. Louis and carload minimums beyond was established. The initial rate was established from New Orleans, Louisiana, to Chicago, Illinois, and became effective April 10, 1930, in Item 2802 of Supplement [fol. 25] 17 to F.B.L. Tariff 6-G, Agent L. D. Chaffee's I.C.C. No. A-176. Sulphur moving on this rate was produced in Texas and handled from Galveston, Texas, to New Orleans by coastwise steamer. The steamer service was somewhat irregular and the traffic was handled on a combination of separately established rates to and from New Orleans. Other destinations have been added from time to time until at the present time there are joint barge-rail rates in effect from New Orleans to the destinations as shown in the top block of my Exhibit—

I would like to number that 2.

Exam. Wilkins: That will be 1.

A. (Continued) We will make it Exhibit 1, and one page statement headed "Present rates on Sulphur (Brimstone)," and there are two blocks of rates shown.

(Complainant's Exhibit No. 1, Witness Hartmann, was marked for identification.)

Exam. Wilkins: It is so marked for identification.

[fol. 1] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 30731

AMERICAN BARGE LINE COMPANY, COYLE LINES, INC., DIXIE CARRIERS, INC., Inland Waterways Corporations (Operating Federal Barge Lines), Complainants,

vs.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, ILLINOIS TERMINAL RAILROAD COMPANY, The New York Central Railroad Company, Wabash Railroad Company, Defendants

COMPLAINT—Filed December 13, 1950

The complaint of the above-named complainants respectfully shows:

I

That complainants are corporations engaged in transportation as common carriers by water of general commodities (including sulphur) under certificates of convenience and necessity issued by the Interstate Commerce Commission; that over routes authorized by their respective certificates and to the extent their respective routes traverse the waterways named below, complainants are so engaged on the Mississippi River between East St. Louis, Illinois, and Port Sulphur, Louisiana, and on the Gulf Intracoastal Canal between New Orleans, Louisiana, and Galveston, Texas; that the transportation of sulphur by complainants from Galveston via New Orleans to East St. Louis is under circumstances and conditions which subject such transportation to Part III of the Interstate Commerce Act; and that said complainants are connecting carriers of the above-named defendants insofar as said defendants and railways [fol. 2] connecting therewith operate to, from and via ports on the waterways just named.

II

That the defendants above-named are common carriers by railroad engaged in interstate commerce between various

A. (Continued) Subsequently, barge-rail rates were published from Port Sulphur, Louisiana, a barge origin point nearby Louisiana production points located on the Mississippi River approximately 60 miles below New Orleans, to Joliet, Illinois, and other destinations shown in the second block of my Exhibit 1. Prior to September 22, 1949, the joint barge-rail rate on sulphur from Port Sulphur, Louisiana, to Joliet, Illinois, applied to Danville, Illinois, under the application of the intermediate rule via certain [fol. 26] routes of the Chicago and Eastern Illinois Railroad and New York Central. Other rail carriers operating beyond East St. Louis, Illinois, had no routes to Joliet, Illinois, through Danville, Illinois, and consequently could not participate in the movement of sulphur to Danville. A rail proposal was subsequently approved by the Illinois Freight Association under which Federal was requested to amend its tariff by publishing the Joliet rate specifically at Danville for application via Federal Barge Lines to East St. Louis thence Chicago and Eastern Illinois direct, New York Central direct, Illinois Terminal direct and Wabash Railroad. This publication was made effective September 22, 1949, in Supplement No. 3 to Federal's Tariff 27-I, ICC 277. The current rates are published in Federal's Tariff 27-J, ICC 283.

By Mr. Belnap:

Q. What was the date of the first joint rate to Joliet, Mr. Hartmann?

A. September 14, 1948.

Q. Can you give the tariff reference?

A. Item 215, Supplement 2 to Federal's Tariff 27-G, ICC 271.

Q. Was that published as a base rate and subject to the ex-parte tariffs then in effect?

A. That's correct.

Q. What was the base rate as published?

A. $4.64 per gross ton.

Q. What was the actual rate on the date effective?

[fol. 27] A. $6.11.

Q. When the rate was published specifically to Danville, what was the measure of the rate?

states in the United States and as such defendants are subject to the provisions of the Interstate Commerce Act.

III

That the defendants, to the extent they participate in the transportation, maintain on sulphur in carloads from Galveston, and other origins in Texas to Danville, Illinois, joint rates over through all-rail routes while contemporaneously refusing to join complainants in joint differential rates over through barge-and-rail routes from Galveston to Danville; that as a result the existing rates and charges over barge-and-rail routes from Galveston to Danville are excessive and unreasonable; that it is necessary or desirable in the public interest for the defendants and the complainants to establish such through barge-and-rail routes and joint rates thereover and to maintain in connection therewith reasonable differentials under the corresponding all-rail rates; and that said refusal of the defendants is discriminatory against complainants as connecting carriers, said discrimination being in favor of connecting carriers by railroad with whom said defendants participate in the maintenance of through all-rail routes and joint rates thereover.

IV

That the defendants have now published a reduction in their all-rail rates from both Galveston and other Texas points and from Port Sulphur, Louisiana, to Danville, as carried in Supplement No. 57 to S. W. L. Tariff No. 102-W, Agent D. Q. Marsh's I. C. C. 3862, effective December 24, 1950, concurrently with an application for relief from the Fourth Section, S. W. F. B. B-4238; that publication of such reduction while refusing to join complainants in reasonable joint differential rates at reasonable divisions over existing through barge and rail routes from Galveston to Danville augments and aggravates the discrimination against com-[fol. 3] plainants as connecting common carriers of property.

V

That by reason of the facts stated in the foregoing paragraphs the defendants have failed and refused to establish

and maintain reasonable through routes and joint rates with complainants in violation of sections 1 and 307(d) of the Interstate Commerce Act; and defendants are maintaining rates and charges which are discriminatory against complainants as connecting carriers in violation of section 3(4) thereof.

Wherefore, complainants pray that defendants be required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants, and each of them, to cease and desist from the aforesaid violations of said Act, and establish and put in force and apply in future to the transportation of sulphur between the origins and destinations named in paragraphs III and IV hereof such through routes and joint rates, as the Commission may deem reasonable and just and otherwise lawful, and that such other and further order or orders be made as the Commission may consider proper in the premises.

Dated at Chicago, Illinois, December 12th, 1950.

American Barge Line Company, Inc., by Wesley A. Rogers, Registered Practitioner, Grant Building, Pittsburgh 19, Pa. Coyle Lines, Inc., by M. M. Cummings, Vice President, P. O. Box 6056, Station A, New Orleans 14, La. Dixie Carriers, Inc., by John S. Hinkle, Vice President, Cotton Exchange Bldg., Houston 2, Texas. Inland Waterways Corporation (Operating Federal Barge Lines), International Bldg., New Orleans 12, La., by (S.) John S. Belnap, John S. Burchmore, Robert N. Burchmore, Nuel D. Belnap, 2106 Field Bldg., Chicago 3, Ill., Its Attorneys.

[fol. 4] BEFORE THE INTERSTATE COMMERCE COMMISSION

[Title omitted]

PETITION OF GALVESTON CHAMBER OF COMMERCE FOR LEAVE TO INTERVENE—Filed January 19, 1951

Comes now your Petitioner, the Galveston Chamber of Commerce, and respectfully represents that it has an interest in the above-entitled proceeding, and desires to in-

A. The $6.66.

Q. That represents an increase over the $6.41 for what reason?

A. Because the ex-parte 168 increases had become effective.

Q. Proceed.

A. No joint barge-rail rates have ever been published on sulphur from Galveston, Texas.

Mr. Day: Pardon me. Does that mean to any point?

The Witness: That is to any point.

A. (Continued) In recent years common carrier barge services have been established and developed between Galveston and New Orleans on the Gulf Intracoastal Canal. The common carrier services on that waterway involved in the instant case are Coyle Lines, Inc., and Dixie Carriers, Inc.

By Mr. Belnap:

Q. Those lines are also complainants.

A. That's Correct.

Federal has maintained for several years joint all-water rates with the barge lines just named from Galveston, Texas, to Upper River Ports served by Federal such as East St. Louis, and Chicago, Illinois. In its all-water rate structure Federal has maintained New Orleans and Port Sulphur, which it serves directly, on the same basis. Joint all-water rates with connecting barge-lines from Galveston [fol. 28] have been and are based $1.01 per gross ton over Federal's local rates from Port Sulphur and New Orleans.

At the request of shipper, Federal filed a formal proposal with the Illinois Freight Association on December 27, 1949, proposing a joint barge-rail rate from Galveston, Texas, to Danville, Illinois, of $7.67 per gross ton, subject to barge minimum weight to East St. Louis, Illinois, and carload minimum weight beyond. This rate was made $1.01 per gross ton higher than the applicable barge-rail rate from Port Sulphur, Louisiana, to Danville, Illinois. The $1.01 per gross ton spread used in this proposal is the same as that existing in all-water rates from Port Sulphur and Galveston to river ports served by the Federal Barge Lines as well as rates to ports on the Great Lakes to

which sulphur is handled via Federal Barge Lines to Chicago thence Great Lakes Carriers. This proposal was handled by the Illinois Freight Association under Docket IRC 960-15.

Under date of January 16, 1950, the Chairman of the Illinois Freight Association advised Federal that this proposal had been considered by the Illinois Rate Committee at its January, 1950, meeting at which time it was not recommended.

At the specific request of the shipper, Federal requested the Chairman of the Illinois Freight Association to redocket this proposal with his association and both the shipper and the consignee located at Danville wrote the Chairman of the Illinois Freight Association complaining of the [fol. 29] discrimination against Galveston, Texas, and requested that the proposal be approved.

Under date of March 24, 1950, the Chairman of the Illinois Freight Association advised that the subject was considered by the Illinois Rate Committee at its March, 1950, meeting at which time the following was recommended:

"The proposal as docketed, amended to add Depue, Illinois, at the same rate as LaSalle, Illinois, and with the same route."

Under date of May 22, 1950, the Chairman of the Illinois Freight Association advised that this proposal was given further consideration at a recent meeting of the Illinois Executive Committee and it was not recommended.

Exhibit 2——

Exam. Wilkins: That will be so marked for identification.

(Complainant's Exhibit No. 2, Witness Hartmann, was marked for identification.)

A. (Continued) Exhibit 2 is a mimeographed map showing the *the* all-rail route from New Gulf, Texas, a representative Texas sulphur mine nearby Galveston, Texas, to Danville, Illinois, via the short route composed of Southern Pacific to Shreveport, Louisiana, Texas & Pacific to Texarkana, Texas, Missouri Pacific to St. Louis, Chicago and Eastern Illinois to Glover, Illinois, and Illinois Terminal

tervene in and become party to said proceeding, and for grounds of the proposed intervention says:

I.

That the Galveston Chamber of Commerce is a voluntary organization incorporated under the laws of the State of Texas, with its principal office and place of business located in the City of Galveston, Texas, and whose membership consists of persons, firms, corporations and others engaged in the business of handling various commodities in domestic and foreign waterborne commerce, and one of its constituent members, the Board of Trustees of Galveston Wharves, operates the waterfront properties acquired by the City of Galveston, as authorized by the Commission in *City of Galveston, Acquisition, Operation, and Bonds*, 242 I. C. C. 605, [fol. 5] which includes docks, wharves, transit sheds, and other equipment, and the maintenance and construction of specially designed docks and piers used in the handling of crude sulphur in domestic and foreign waterborne commerce, involving expenditure of millions of dollars.

II

That Petitioner has for its object and purpose the protection and welfare of its members; also, the general welfare of said City and Port where large private, municipal and federal investments have been made in channel works, docks, wharves, and other port terminal facilities for use in the handling of domestic and foreign waterborne commerce.

That crude sulphur moves extensively through Galveston's port facilities via barge through the intracoastal canal to various destinations reached through our inland waterway system, including Danville, Illinois, Great Lakes ports, etc.

That the establishment of reduced all-rail rates from Texas origins to Danville, Illinois, without the establishment of joint barge-rail rates via barge-and-rail routes from Galveston to Danville, Illinois, will directly and effectively result in a diversion of sulphur to all-rail routes, thereby adversely affecting our interests. Therefore, your

Petitioner desires to intervene in support of complainant.

The granting of this petition will not broaden the issue.

III

Wherefore, said Petitioner prays leave to intervene and be treated as party hereto with the right to have notice of hearing and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by coun-
[fol. 6] sel upon brief, and at the oral argument, if oral argument is granted.

Respectfully submitted, Galveston Chamber of Commerce, by (S.) F. G. Robinson, Traffic Manager and Registered Practitioner.

Dated at Galveston, Texas, January 16th, 1951.

Duly sworn to by F. G. Robinson. Jurat omitted in printing.

[fol. 7] INTERSTATE COMMERCE COMMISSION

[Title omitted]

ORDER PERMITTING INTERVENTION OF GALVESTON CHAMBER OF COMMERCE—January 24, 1951

In the Matter of Petition for Leave to Intervene.

Present: Charles D. Mahaffie, Commissioner, to whom the above-entitled matter has been assigned for action thereon;

Upon consideration of the record in the above-entitled proceeding and petition filed on behalf of the Galveston Chamber of Commerce;

It is ordered, That the said the Galveston Chamber of Commerce, be, and it is hereby, permitted to intervene and be treated as a party to this proceeding, with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses and be heard on brief and on oral argument, if oral argument is heard; provided,

to Danville is 1,048 miles. The all-rail distance via the indirect route consisting of southern Pacific to New Orleans, Louisiana, Illinois Central to East St. Louis, Illinois, thence Wabash to Danville, Illinois, is 1,339 miles.

[fol. 30] The all water distance from Galveston, Texas, to East St. Louis, Illinois, via the Gulf Intracoastal Canal to New Orleans, Louisiana, thence, the Mississippi River as shown by red line on the map is 1,406 miles, made up 357 miles from Galveston to New Orleans and 1,049 miles from New Orleans to East St. Louis. The same rail routes are available beyond East St. Louis on traffic brought into East St. Louis by barge as on traffic brought in by rail carriers.

Exhibit 1 shows the extent to which joint through barge-rail rates are published on crude sulphur in bargeload quantities from New Orleans, Baton Rouge and Port Sulphur, Louisiana, and a comparison of these rates with the all-rail rates. The barge-rail rates from New Orleans and Baton Rouge, Louisiana, are proportional rates and apply only on coastwise traffic and include the cost of transferring to barges of the Inland Waterways Corporation at New Orleans or Baton Rouge, Louisiana. The rates from Port Sulphur, Louisiana, apply on sulphur originating at that point.

Prior to Ex-Parte 168 increases the $6.72 rate shown from New Orleans and Baton Rouge and the $6.66 rate shown from Port Sulphur, Louisiana, were both $6.11. Under the Ex-Parte 168 increases, the rate from New Orleans and Baton Rouge was subjected to Table 5 of the Increase Tariff or an increase of 10 per cent while the rate from Port Sulphur, Louisiana, was subject to Table 3 of the Increase Tariff or an increase of 9 per cent. This [fol. 31] accounts for the fact that the proportional rate from New Orleans and Baton Rouge is presently $6.72 whereas the local rate from Port Sulphur, Louisiana, is $6.66.

The price of sulphur loaded in barges at Port Sulphur, Louisiana, or Galveston, Texas, is $1.50 per gross ton higher than on sulphur loaded into rail cars at Port Sulphur, Louisiana, or at Texas mines. In making a comparison of the barge-rail rates with the all-rail rates, this $1.50 per gross ton difference in price must be taken into consider-

ation. On this basis, the charges via the barge-rail route from Port Sulphur, Louisiana, to Danville would be $8.16 per gross ton made up of the price differential of $1.50 per gross ton, plus the barge-rail rate of $6.66.

If a barge-rail rate is established from Galveston, Texas, to Danville, Illinois, on the usual basis of $1.01 per gross ton over the rate from Port Sulphur, Louisiana, such barge-rail rate will be $7.67 per gross ton. Adding the $1.50 price differential would make the charges via the barge-rail route from Galveston to Danville $9.17 per gross ton. This rate is to be compared with the presently effective all-rail rate of $9.184 from Galveston, Texas, to Danville, Illinois.

By Mr. Belnap:

Q. That is a difference, Mr. Hartmann, between those two rates of only 1.4 cents per gross ton?

A. That's correct.

Q. If the only thing to be considered was the rate you had [fol. 32] just given, would you be able to get any traffic on that basis?

A. No, I am quite sure we wouldn't.

Q. What has been your experience as to whether there is a need for a substantial differential or difference by some method or other, if you are to get traffic?

A. Well, there always has been the necessity of a differential under the rail rate in order for the barge carriers to participate in the traffic. We have had experience in a number of instances where differentials were either eliminated or reduced to a point where the barge line lost the traffic because there apparently wasn't enough savings to the shipper or man paying the freight charges to permit movement by water.

Q. Has it been your experience you have to have substantial difference to get the traffic?

A. That's right.

Q. What explains your desire to put in this rate which is a difference of only 1.4 cents per gross ton?

A. That shipper said we would probably be able to get some sulphur from Galveston on that rate because of some

however, that the permission to intervene herein granted shall not be construed to allow interyener to introduce evidence which will unduly broaden the issues raised in the complaint;

It is further ordered, That a copy of the intervening petition be served upon complainants and defendants; and that a copy of this order be served upon each of the parties to this proceeding;

Dated at Washington, D. C., this 24th day of January A.D., 1951.

By the Commission, Commissioner Mahaffie. W. P. Bartel, Secretary. (Seal.)

[fol. 8] BEFORE THE INTERSTATE COMMERCE COMMISSION

PETITION FOR LEAVE TO INTERVENE IN BEHALF OF THE AMERICAN WATERWAYS OPERATORS, INC.

[fol. 9] Comes now your petitioner, The American Waterways Operators, Inc., and respectfully represents that it has an interest in the matters in controversy in the above-entitled proceeding and desires to intervene in and become a party to said proceeding, and for grounds of the proposed intervention says:

I. That The American Waterways Operators, Inc., is a Corporation, incorporated in Delaware, with the principal office at 1319 F Street, N. W., Washington, D. C., and is an Association of common, contract, and private water carriers who operate throughout the Ohio and Mississippi River Systems, the Gulf Intracoastal Waterway, the Gulf of Mexico, the Atlantic Intracoastal Waterways and waterways in California and Washington. The organization is a non-profit Corporation which has for its general purpose the consideration and solution of problems of management and policy affecting the operation and welfare of water carriers.

II. That under the policy of The American Waterways Operators, Inc., as duly established by the Board of Directors under the Constitution and By-Laws, the

[fol.10] Association is required to intervene in cases such as the instant proceeding where the issues and the results thereof affect the general welfare of the industry.

III. That the Commission by Division 3 has issued its Report and Order in the entitled proceeding on December 22, 1952, Commissioner Knudsen dissenting. That there has been filed under date of March 6, 1953, a Petition for reopening, reconsideration and Oral Argument by the complainants. Therefore, because of the serious effect of the majority opinion in this case, the common water carrier industry as a whole and this Association, representing inland water carriers generally throughout the United States, have a direct interest in the proceedings and on this basis this Petition for leave to intervene is filed.

IV. That this petition of intervention does not unduly broaden the issues in this proceeding.

Wherefore, The American Waterways Operators, Inc., prays leave to intervene in and be treated as a party hereto [fol. 11] with the right to participate in any future proceeding conducted in connection herewith, including oral argument.

(S.) John H. Eisenhart, Jr., Attorney.

Dated at Washington, D. C., March 12, 1953.

[fol. 12] [Title omitted]

ORDER PERMITTING INTERVENTION OF AMERICAN WATERWAYS OPERATORS, INC.—May 11, 1953

Upon consideration of the record in the above-entitled proceeding and petition filed on behalf of The American Waterways Operators, Inc.;

It is ordered, That the said The American Waterways Operators, Inc., be, and it is hereby, permitted to intervene and be treated as a party hereto for the purpose of participating in any further proceedings herein.

It is further ordered, That a copy of this order be served upon each of the parties to this proceeding.

By the Commission, Division 3. George W. Laird, Acting Secretary. (Seal.)

[fol. 13] BEFORE THE INTERSTATE COMMERCE COMMISSION

[Title omitted]

ANSWER OF DEFENDANT CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY.—Filed January 8, 1951

Now comes the defendant above named, and, for its answer to the complaint filed herein, respectfully states:

1. This defendant has no information respecting the truth or falsity of the allegations contained in Paragraph(s) 1.

2. This defendant admits that it is a common carrier, and, as such, is subject to the provisions of the Act to Regulate Commerce.

4. This defendant has not checked the allegations contained in Paragraph(s) 4, and can, therefore, neither admit nor deny the correctness of the same, but leaves complainant to the strict proof thereof at the trial of this cause.

3 and 5. This defendant denies the allegations contained in Paragraph(s) 3 and 5 of the complaint.

[fol. 14] Wherefore, having fully answered, this defendant prays the dismissal of the complaint filed herein.

This defendant hereby certifies that it has this day served the foregoing answer upon each party signing the complaint, by mailing to him a copy thereof, properly addressed.

Chicago & Eastern Illinois Railroad Company, by Thomas N. Cook, General Attorney.

Dated at Chicago, Illinois, January 4, 1951.

[fol. 15] BEFORE THE INTERSTATE COMMERCE COMMISSION

[Title omitted]

SEPARATE ANSWER OF DEFENDANT, WABASH RAILROAD COMPANY—Filed January 15, 1951

Comes now the Wabash Railroad Company, and as its answer to complaint filed in the above-entitled cause, respectfully states to the Commission as follows:

1. It admits the allegations contained in paragraphs numbered I and II.

2. It denies the allegations contained in paragraphs numbered III, IV and V.

3. The Wabash Railroad Company does not have sufficient information to either affirm or deny paragraph of the complaint numbered.

Wherefore, having fully answered, Wabash Railroad Company asks that this complaint be dismissed as to it.

Respectfully submitted, (S.) by R. B. Elster, Its Attorney.

January 11, 1951, St. Louis, Missouri, R. B. Elster, Attorney, 1667 Railway Exchange Bldg., St. Louis 1, Missouri.

[fol. 16] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 30731

AMERICAN BARGE LINE COMPANY, et al.

v.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, et al.

Stenographer's Minutes of March 13, 1951

Room A-1, Hotel New Orleans,
New Orleans, Louisiana.

Met, pursuant to notice, at 9:30 a. m.

Before Andrew C. Wilkins, Examiner

APPEARANCES

Nuel D. Belnap, 2106 Field Building, Chicago 3, Illinois, appearing for Inland Waterways Corporation (operating Federal Barge Lines), complainant.

Joseph G. Hartmann, 611 Gravier Street, New Orleans 12, Louisiana, appearing for Inland Waterways Corporation (operating Federal Barge Lines), complainant.

Wesley A. Rogers, 1520 Grant Building, Pittsburg 19, Pennsylvania, appearing for American Barge Line Company, complainant.

Donald Macleay, 1625 K Street, N. W., Washington 6, D. C., appearing for Coyle Lines, Inc., and Dixie Carriers, Inc., complainants.

F. G. Robinson and E. H. Thornton, Galveston, Texas, appearing for Galveston Chamber of Commerce, inter-
[fol. 17] venor in support of complaint.

Leo P. Day, 1225 LaSalle Station, Chicago 5, Illinois, appearing for defendant.

George T. Barry, 1463 Railway Exchange Building, St. Louis, Missouri, appearing for Wabash Railroad Company, of defendants.

J. F. McWilliams, Room 701, 332 South Michigan Avenue, Chicago 4, Illinois, appearing for Chicago and Eastern Illinois Railroad Company, of defendants.

[fol. 18] COLLOQUY BETWEEN EXAMINER AND COUNSEL

Exam. Wilkins: The Interstate Commerce Commission has assigned for hearing before me at this time and place Docket No. 30731, American Barge Line Company, et al. vs. Chicago and Eastern Illinois Railroad Company, et al.

Who appears for complainants?

Mr. Belnap: Nuel D. Belnap and Joseph Hartmann, appearing for Inland Waterways Corporation, operating Federal Barge Lines, complainant.

Mr. Rogers: Wesley A. Rogers, 1520 Grant Building, Pittsburg, Pennsylvania, appearing for American Barge Line Company, complainant.

Exam. Wilkins: State whether you are a practitioner.

Mr. Rogers: I am a registered practitioner.

Mr. Macleay: Donald Macleay, 1625 K Street, N. W. Washington 6, D. C., appearing for Coyle Lines and Dixie Carriers. I am a registered practitioner.

Exam. Wilkins: Any other appearances for complainants?

Mr. Robinson: Intervenor in support of.

Exam. Wilkins: Has your petition been granted?

Mr. Robinson: Yes, sir.

Exam. Wilkins: When was it granted?

Mr. Robinson: It was granted by order of the Commission dated January 24, 1951.

Exam. Wilkins: Who was that?

[fol. 19] Mr. Robinson: The Galveston Chamber of Commerce.

Exam. Wilkins: That's correct.

Any other appearances for complainants or intervenors in support of complainants?

Mr. Robinson: F. G. Robinson and E. H. Thornton, Galveston, Texas, appearing for Galveston Chamber of Commerce, intervenors in support of complainant.

Exam. Wilkins: You are both practitioners?

Mr. Robinson: We are both practitioners, yes.

Exam. Wilkins: Any other appearances for complainants or intervenors in support of complainant?

(No response.)

Exam. Wilkins: Who appear for defendant?

Mr. Day: Leo P. Day, 1225 LaSalle Station, Chicago 5, Illinois. I have been admitted to practice.

Exam. Wilkins: Any other appearances for defendants?

Mr. Barry: George T. Barry, 1463 Railway Exchange Building, St. Louis, Missouri, appearing for Wabash Railroad Company. I have been admitted to practice.

Exam. Wilkins: Any other appearances?

Mr. McWilliams: J. F. McWilliams, Room 701, 332 South Michigan Avenue, Chicago 4, Illinois, appearing on behalf of Chicago and Eastern Illinois Railroad Company. I am a registered practitioner.

Exam. Wilkins: Any other appearances?

[fol. 20] (No response.)

Exam. Wilkins: We have another proceeding being heard here which has not been concluded.

Is there any objection on the part of the parties in this Docket No. 30731 if we call a recess until we can complete the proceeding in I&S Docket 5873?

Mr. Belnap: Can I make one inquiry off the record, sir?

Exam. Wilkins: Very well.

(Discussion off the record.)

Exam. Wilkins: On the record.

Mr. Belnap: No objection.

Mr. Day: The defendants have no objection.

Exam. Wilkins: Very well. The hearing in No. 30731 will be recessed and you will be notified when it will be resumed.

(Whereupon, at 9:45 a. m., a recess was taken pending notification the hearing would be resumed.)

[fol. 21] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 30731

AMERICAN BARGE LINE COMPANY, et al.

v.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, et al.

Stenographer's Minutes of March 14, 1951

Room A-1, Hotel New Orleans,
New Orleans, Louisiana.

Met, pursuant to adjournment, at 2:00 p. m.

Before Andrew C. Wilkins, Examiner

APPEARANCES

(As heretofore noted.)

[fol. 22] PROCEEDINGS

Exam. Wilkins: The hearing will come to order.

The hearing in Docket No. 30731, American Barge Line Company, et al. vs. Chicago and Eastern Illinois Railroad Company, et al., was called as assigned on March 13, at 9:30 a. m., and a recess was taken pending the continuance of the hearing in another proceeding.

We will now resume the hearing in No. 30731, the appearances having previously been taken.

In this case, complainants allege that the defendants to the extent they participate in the transportation, maintain on sulphur in carload from Galveston and other origins in Texas to Danville, Illinois, joint rates over through all-rail routes while contemporaneously refusing to join complainants in joint differential rates over through barge and rail routes from Galveston to Danville, that as a result the existing rates and charges over barge and rail routes from Galveston to Danville are excessive and unreasonable; that it is necessary or desirable in the public interest for the defendants and complainants to establish such

Exam. Wilkins: Without objection, Exhibits 1 and 2 will be received in evidence and so marked.

(Complainant's Exhibits Nos. 1 and 2, Witness Hartmann, were received in evidence.)

Exam. Wilkins: You are excused.

(Witness excused.)

Exam. Wilkins: Anything further?

Mr. Belnap: Mr. Rogers.

WESLEY A. ROGERS was sworn and testified as follows:

Direct examination.

By Mr. Belnap:

Q. Will you state your name, your address and the Company with whom you are connected?

A. My name is Wesley A. Rogers. I am traffic manager for the American Barge Line Company, address 1520 Grant Building, Pittsburgh, Pennsylvania. I have been em- [fol. 46] ployed by the American Barge Line Company for the past eleven years, handling their various problems dealing with rates, divisions, and interstate commerce matters. Prior to my association with American Barge Line Company, I was employed in Chicago and St. Louis by the Wabash Railway for a number of years; and prior to that time I was with the Keeshin Motor Express Company in their rate department.

The American Barge Line Company in the latter part of 1948 established in connection with the Illinois lines a joint barge and rail rate from Port Sulphur, Louisiana, to Joliet, Illinois. And at various times since then has established from Port Sulphur, Louisiana, joint barge and rail rates to other Illinois points, including Danville, Illinois. Those rates are now carried in American Barge Line Company Tariff I.C.C. No. 99, in connection with which, the rail lines participating in the haul beyond East St. Louis concur.

The American Barge Line Company proposed to the

Illinois Freight Association, on or about March 23, 1950, that the existing barge and rail rates from Port Sulphur be extended to Galveston, Texas, on the accepted basis of $1.01 over the Port Sulphur joint rates. The Illinois Freight Association, in behalf of the lines serving Danville, recommended that their proposal be not concurred in, and consequently, the rates could not be established.

Mr. Day: This is just a repetition of the previous witness' testimony.

Exam. Wilkins: It seems to be some repetition.

[fol. 47] The Witness: I wanted to get in our tariffs, our publication and our handling.

Exam. Wilkins: Proceed.

A. (Continued:) For the years 1947, 1948, 1949, and 1950, the American Barge Line Company handled in millions of ton miles the following, all freight: 1,143, 1,431, 1,410, and 1,949; and the revenue from that tonnage in thousands of dollars for the same years, amounted to 3,326, 4,651, 4,807, and 6,278. Of those ton mile and revenue figures, the percentage of the sulphur revenue to the revenue obtained from all freight were, respectively: 16.6 per cent, 11.7 per cent, 10.5 per cent, and 10.6 per cent, with the percentage relationship cargo ton miles in sulphur to total ton miles for the same years: 18.9 per cent, 14.5 per cent, 12.5 per cent, and 12 per cent.

The American Barge Line Company uses a different system of computing mileages than the Federal Barge. Its mileages between the points involved, that is to say, from Galveston to the point of interchange with the rail line, East St. Louis, are carried in Agent Rogers Tariff 4-1-D I.C.C. No. 5.

Since the barges of the American Barge Line Company in the handling of its traffic, port to port are loaded to capacity, we feel that a figure in earnings of mills per ton mile are very significant. For the haul from Port Sulphur to East St. Louis, under our division of the rate from Port Sulphur to Danville, for the haul of 1,208 miles, the earn-

[fol. 48] ings are 3.6 mills per ton mile. That earning compares with sulphur rates to other points in the area under consideration.

As an example, to Calvert, Kentucky, about 60 miles

absorption made of the charge, transportation charge, from Galveston to New Orleans.

Q. Why does not a joint rate from Port Sulphur satisfy this concern at Danville?

A. Because the sulphur moving to Danville has, as far as I know, all moved from Galveston, Texas, and not from Port Sulphur.

[fol. 33] Q. Have you participated in any movement of sulphur from Port Sulphur to Danville?

A. None.

Q. Have you agreed division with the rail lines beyond St. Louis in connection with the $6.66 joint barge-rail rate from Port Sulphur?

A. We have.

Q. And what is the measure of that division?

A. Rail lines beyond East St. Louis receive $2.26 per gross ton.

Q. That leaves $4.40 for your water haul from Port Sulphur to East St. Louis?

A. That's correct.

Q. In connection with the proposed barge-rail rate from Galveston to Danville of $7.67, what is your plan as to the division to the rail lines beyond East St. Louis?

Mr. Day: I object to that. I don't think the bargeline will fix any division.

By Mr. Belnap:

Q. What are you going to suggest to them?

Mr. Day: I object.

Exam. Wilkins: It appears to the Examiner if they are going to propose this rate they are asking for, it is something they ought to know.

Mr. Day: I submit the division is not a matter for one party even if required to be established.

[fol. 34] Mr. Belnap: We appreciate that——

Exam. Wilkins: It is just information that——

Mr. Belnap: I want the Commission to be advised.

Mr. Day: We object to going into the question here. It is not involved.

Mr. Belnap: I appreciate that. I want the Commission

advised what we propose to give the rail lines, so they will know what is left for the water haul from Galveston to East St. Louis.

Exam. Wilkins: You mean if they don't accept the division you offer, you are going to withdraw from it?

Mr. Belnap: Not at all. We will fight that out from where we have to fight. We have an agreed basis for that division now from Port Sulphur, and it would seem to us that should be the same division out of Galveston. But if the rail carriers have a different idea, we will naturally negotiate with them, but are proceeding on that assumption at the present time.

Exam. Wilkins: For whatever it is worth, the Examiner will let it stand.

The Witness: The proposed rate of $7.67 per gross ton rate from Galveston to Danville, the proposed rail division beyond East St. Louis will be the same as the rail carriers beyond East St. Louis received out of the Port Sulphur rate, or $2.26 per gross ton.

[fol. 35] By Mr. Belnap:

Q. What would that leave to the barge lines which participate in the all water line up to East St. Louis?

A. $5.41 per gross ton.

Q. What does that rate earn per water ton mile?

A. Well, the distance from Galveston to East St. Louis is 1,406 miles, $5.41 per gross ton will result in 3.84 mills per ton mile.

Q. In your experience in handling traffic like sulphur, that is, the bargeload traffic, is an earning of 3.82 mills looked upon as reasonably compensatory for water service?

A. As you stated, on traffic such as bargeload quantities, it is.

Q. What is your all-water rate to East St. Louis from Galveston?

A. It should be $5.32, I believe.

Q. Don't you have it?

Mr. Day: We will stipulate it is 5.32.

A. (Continued:) It is right.

Mr. Day: That's right.

A. (Continued:) Five dollars and thirty-two cents per gross ton.

Q. Would there be any difference between the services the water carriers do render for that $5.32 rate as against what they would render on their part of a joint haul to Danville?

A. Well, at East St. Louis, the point of interchange with the rail carriers are on the Danville sulphur and the desti-
[fol. 36] nation on the local sulphur, there would be a difference as to the switching absorption and per diem and reclaim that would have to be absorbed by the Federal Barge Line.

Q. A difference, in what direction is the difference?

A. On the Danville traffic interchanged with the rail carriers, the switching charge, switching absorption by Federal would be less than on a local shipment, and the per diem on the rail equipment and the per diem and reclaim would be less; in fact, there would be no reclaim; there would be only per diem.

Q. And would those charges be borne out of the water line share of the joint rate, if established?

A. That's correct.

Q. Can you give us an approximate figure what the switching and per diem would be in connection with the joint movement?

A. On a local shipment, the switching would approximate thirty cents a gross ton. The per diem and reclaim would average about fifteen cents a gross ton.

Q. That would come out of the $5.32 local rate?

A. Out of the $5.32 local rate. On the Danville sulphur interchanged with rail carriers at East St. Louis, the switching would approximate probably twenty cents per gross ton; per diem would probably be eight or nine cents per gross ton.

Q. That $5.32 rate to East St. Louis includes delivery in rail cars at consignee's sidings?

A. That's correct.

[fol. 37] Mr. Day: Wait a minute. You don't mean that.

Mr. Belnap: That is what I thought.

Mr. Day: $5.32 is the water handling charge.

It includes the handling into the cars at the ports?

The Witness: At East St. Louis, and the absorption of switching charge to the industry.

By Mr. Belnap:

Q. But not the consignee's plant at Danville?

A. Oh no.

Mr. Day: He didn't say East St. Louis. The consignee here is the Danville receiver.

Mr. Belnap: If we are talking about a rate to Danville, which we were not at this time.

By Mr. Belnap:

Q. Do you have pending before the Commission at this time, Mr. Hartmann, an all-water rate on Sulphur from Port Sulphur to Dubuque, Iowa?

A. I have.

Q. Give the reference. That is a pending case, is it not?

A. That's correct. It is I&S Docket 5834, sulphur, Port Sulphur, Louisiana, to Dubuque, Iowa. Proposed report has been issued by the Examiner.

Mr. Day: I object to that, if your Honor please. I think it is incompetent and irrelevant. None of these defendants have any interest in rates to Dubuque from Texas sulphur points.

Mr. Belnap: I am going to have the witness tell about it. It is a case pending before the Commission and it is a [fol. 38] rate under suspension. But before this case is concluded, there will be some decision in that case.

Exam. Wilkins: You don't know that.

Mr. Belnap: Except it is an I&S case.

Exam. Wilkins: You are not offering the proposed report?

Mr. Belnap: Oh no, I am asking the witness to tell about that rate, what Federal proposes.

Exam. Wilkins: As a comparison?

Mr. Belnap: Sure.

Exam. Wilkins: For that purpose, we will let it stand. Proceed.

By Mr. Belnap:

Q. What is the rate proposal?

A. $4.80 per gross ton. The $4.80 rate applies from barge origin to in barge at Dubuque.

Q. The destination in that rate has a different application, does it not, than your five dollar thirty-two cent rate to East St. Louis?

A. That's correct.

Q. What will that rate earn? The one from Port Sulphur to Dubuque.

A. $4.80 rate, for a distance from Port Sulphur, Louisiana, to Dubuque of 1,504 miles, would earn 3.19 mills per ton mile.

Q. Now, in connection with the publication of that rate, did the corporation make a special study of the cost to it of transporting sulphur?

[fol. 39] A. It did.

Q. And as a result of that study, what did you find the cost to be for a haul of about 1500 miles?

Mr. Day: I object to that; it is second-hand testimony.

Exam. Wilkins: Again, is that for comparison?

Mr. Belnap: For comparison only.

Mr. Day: The witness hasn't shown he made a cost study. He said the Company made it or someone for the Company, but we had no opportunity to cross examine the man who made it.

Exam. Wilkins: Can he stand cross examination on it?

Mr. Belnap: On what was reported to him. That is all I am asking him to testify, what they told him was the cost.

Exam. Wilkins: Let him proceed temporarily then.

A. The cost that is showed that the cost was $4.03 per gross ton.

By Mr. Belnap:

Q. And was that an all inclusive cost, including return on investment of equipment?

A. It was; it included everything.

Q. Overhead?

A. All overhead, depreciation.

Exam. Wilkins: Is that all?
Mr. Belnap: Yes, that is all.
Exam. Wilkins: Any cross examination?
Mr. Day: We have a little.
Exam. Wilkins: Does anyone have any questions on cross
[fol. 40] examination?

Mr. Day: I have some.

Cross-examination.

By Mr. Day:

Q. Mr. Hartmann, I was a little surprised to hear you say you haven't handled any sulphur for Danville. Didn't you actually handle at least 88 cars in connection with the New York Central Railroad during the last six months of 1950?

A. If we did, Mr. Day, I am as surprised as you are. It is possible, but it is my understanding we haven't.

Q. And the New York Central is one of four lines serving Danville?

A. That is correct.

Q. Don't you know the Chicago and Eastern Illinois also handled cars in connection with your line for Danville?

A. No, sir, I don't.

Mr. Day, may I ask you—you seem to have the papers in front of you—is the Federal Barge Lines shown in there or is that another barge line?

Q. Well, of course, from the railroad standpoint, these are treated as originating at East St. Louis. It shows previous waybill reference Fox Terminal, East St. Louis. Does that mean anything to you?

A. Yes, sir. There has been a barge-rail movement of sulphur to Danville, but not by the Federal Barge Line.

Now, may we go off the record a minute?
[fol. 41] Q. Wait a minute. What does "TML" mean, if you know?

A. TML——
Q. Oh, that is Fox Terminal.

A. May we go off the record a moment. I would like to straighten it up. I want to get some information. I may be wrong, but I don't think I am.

Exam. Wilkins: Off the record a few minutes then.

(Discussion off the record.)

Exam. Wilkins: On the record.

By Mr. Day:

Q. During the discussion off the record, you said that any business that moved or that is moving from Texas by barge would be handled to East St. Louis by another barge line. What would that other barge line be?

A. This—the one I mentioned this morning, formerly Butcher-Arthur, now Commercial Petroleum Transport.

Q. So that that barge line has handled the traffic up to now; your Company has not participated in it?

A. That's correct.

Q. And you are not aware, I take it, that there is a substantial movement by barge?

A. No, I have no idea just how much tonnage is involved.

Q. And, as I say, it is a surprise to you there has been any barge movement at all?

A. No, my surprise was Federal had handled it, because I was positive that we had not.

[fol. 42] Q. Now, this so-called price differential, when sulphur moves by barge from Galveston, the differential being over Port Sulphur, has been explained as representing the handling by railroad and other handling facilities from the points where the sulphur is mined to Galveston, Texas. Is that correct?

A. I understand that it is not the cost of the transportation or the handling at Galveston, but a differential fixed by the sulphur producer with some basis on the cost. It is not the exact cost, itself.

Q. To refresh your recollection, in the cases going on in the past few days, it has been shown that part of that $1.50 charge represents a railroad charge of $1.10 for rail handling. Do you recall that?

A. I recall that that was given as the basis for it.

Q. And that the balance was the handling charge at Galveston?

A. Not the exact handling charge, Mr. Day.

Q. You don't recall that?

A. I recall just the opposite, that the $1.50 rate represents the handling end but is not the exact cost of handling it.

Mr. Belnap: I am willing to stipulate by reference in this record Mr. Robinson's testimony in the previous case, if it will be helpful.

Mr. Day: We don't want to make it as cumbersome as that.

All I am interested in is the price differential. If the witness will state the other items beyond the $1.10 rail rate [fol. 43] shown, that will be satisfactory.

Mr. Belnap: State it from Exhibit 50; that is Exhibit 50 in——

The Witness: I&S 5873. Wait a minute—which ones of these shall I use?

By Mr. Day:

Q. The items I am interested in is wharfage, loading from cars to bins and bins to vessels.

A. Wharfage eleven—these are in cents of gross tons—wharfage eleven cents, unloading from cars to bins thirty-seven cents, from bins to vessel or barge twenty-two cents, stevedoring 4.55 cents, pier rental 1.41 cents.

Q. The rail rate is $1.10 up to Galveston from the mines, isn't it?

A. That's correct.

Q. And all that the shipper charges the customer is a difference of $1.50 reflecting whatever the cost is from the mines up to Galveston; is that right?

A. That is correct.

Q. All right. Isn't it a fact there are no joint rates on any bulk commodities from Galveston or any other intracoastal canal points to Illinois points in connection with barge and rail lines?

A. From Galveston?

Q. Yes.

A. That is correct, so far as I know. I can't think of one [fol. 44] of them.

Q. Now, this 5.32 rate that you referred to as being in effect to East St. Louis, does not actually include the handling into cars, does it? Isn't that charge forty-four cents and isn't that in addition?

A. You mean at East St. Louis?

Q. Yes, on traffic moving to Danville.

A. Well, on traffic going to Danville, if the 5.42 local rate to East St. Louis——

Exam. Wilkins: 5.32.

A. (Continued:) I mean 5.32—were used in making the combination, that 5.32 rate would include the loading into the cars.

By Mr. Day:

Q. Well, let's not speculate on what might be; let's talk about it as it is today, and that is the way you were discussing it in your testimony. You referred to the rate as covering the entire handling into cars at East St. Louis.

A. That's correct.

Q. Now, isn't it a fact that it only includes the switching line at East St. Louis and that it does not include the 44 cents handling charge?

A. Mr. Day, I don't know whether I misunderstood you or not, but the 5.32 is local rate from Galveston to East St. Louis, and includes all accessorial and switching charges at East St. Louis. It is an inclusive rate and point of destination.

[fol. 45] Mr. Day: That isn't our understanding of it. We will show by the tariff what the situation is. Maybe he would rather not give it.

The Witness: No, if you are right and I am wrong, I am perfectly willing to admit it. But I am sure my statement is correct.

Mr. Day: That is all I have.

Exam. Wilkins: Any further questions?

Mr. Belnap: I have no redirect.

A. That's right.

Q. What is the rate to East St. Louis from Galveston, all-rail?

A. I believe it is 39 cents per hundred.

Q. It is shown on Mr. Hartmann's Exhibit 1, I believe, No, it isn't shown there—yes, it is. It is shown as $8.736—873.6 cents?

A. That's right.

Q. Do you make your through Danville all-rail by adding [fol. 64] the local rate of $2.95 to the $8.736?

A. No, sir.

Q. Why do it different with barge lines than rail connections?

A. We don't want to participate with the barge lines and reduce our earnings east of East St. Louis.

Q. You mean it gives you something less than your local rate?

A. That's right.

Q. Don't you participate on that basis with rail lines, taking something less than your local rate?

A. We do.

Q. Why not with the barge lines?

A. It will further reduce our earnings.

Q. The earnings of the line from East St. Louis over to Danville?

A. Yes.

Q. Why?

A. What you have offered, it is a reduction.

Q. From your $2.95?

A. That's right.

Q. And that is the basis of your defense here?

Mr. Day: I object to that.

By Mr. Belnap:

Q. That is the basis of your objection to joining in the rate proposed?

A. That's right. We don't want to receive on earnings on barge traffic anything less than $2.95 east of East St. Louis.

[fol. 65] Q. In that respect you want to treat barge lines differently than you do rail lines?

from Cairo, Illinois, is on a basis of 3.6 mills for a haul of 1,094 miles, and to Joliet, Illinois, for a haul of 1,535 miles on a 3.4 mill basis.

In our contact with the receiver of the sulphur and through other information obtained through the ordinary course of business, we understand that the tonnage involved at Danville approximates 20,000 tons per year, all shipped from Galveston, Texas. We further understand that the receiver controls the routing, and that for the past two or three months, that it has moved via all rail routes from Galveston. It is our further understanding that if the joint rate proposed is established, that we can expect to share to some extent in this movement.

By Mr. Belnap:

Q. The shipper so advised you?
A. Yes,—the consignee.
Q. The consignee at Danville?
A. At Danville, yes.

I believe that is all I have on direct.

Exam. Wilkins: Any cross examination?
Mr. Day: I have no questions.
Exam. Wilkins: Any questions?

(No response.)

Exam. Wilkins: Anything on redirect?
[fol. 49] Mr. Belnap: Nothing.
Exam. Wilkins: You are excused.

(Witness excused.)

Exam. Wilkins: Any other witnesses?
Mr. Belnap: Complainants rest.
Exam. Wilkins: Defendant may proceed.
Mr. Day: Call Mr. Sweet.

Mr. Day: Mr. Examiner, Mr. Sweet was only called as a witness to give facts, not to set the policy of any of these Danville Lines, and I am going to straighten out the matter of whether he has authority to commit these defendants to join in through rates with the barge lines. I am sure he hasn't got it. We do oppose and resist the establishment of joint rates with the barge lines.

By Mr. Belnap:

Q. As to the movement of sulphur to Danville, has Galveston been the origin for all sulphur received at that point or the Texas mines?

A. That's right.

Q. Is the present movement entirely by the all-rail routes?

A. I don't know. I made a check of the last six months in 1950.

Q. Did you make a——did you take a look at what the present situation is?

A. No, sir, I didn't.

Mr. Belnap: Do you have somebody who will know about the present movement, Mr. Day?

Mr. Day: Present movement?

Mr. Belnap: Yes. How it is moving today.

Mr. Day: I don't think so.

By Mr. Belnap:

Q. How did you happen to quit looking?

[fol. 66] A. I just took the last six months; that is fairly representative.

Q. Is that the same as today?

A. I assume it would be representative.

Q. You don't know whether it is comparable with what is going on today?

A. No, I don't know what is going on today.

Q. On your Exhibit 6, you have some percentages there called percentage of circuity. Would it be more accurate to say that is the relation of the water miles in the barge routes to the short rail miles?

A. That's right. The line of the barge is 85½ per cent of the short line rail from Galveston to East St. Louis.

R. L. SWEET was sworn and testified as follows:

Direct examination.

By Mr. Day:

Q. Will you state your name and occupation.

A. My name is R. L. Sweet; I am chief of the Commerce Bureau, 521 LaSalle Street Station, New York Central Railroad Company, Chicago, Illinois.

Q. What has been your railroad experience?

A. I have been with the New York Central Railroad for the past twenty-five years, all of which has been spent in the traffic department with the exception of 8 years, handling rates and, prior to that, I was with the Wabash Railroad for seven years in their rate department.

Q. In other words, in all but eight years of your experience, you have been actively handling rate and tariff matters?

A. That's right.

Q. You are familiar with the rates involved in this proceeding?

A. Yes, sir, I am.

[fol. 50] Q. Are there any joint barge-rail rates in effect from Texas points to Danville?

A. No, not to my knowledge, there has never been published any rate of any character, barge-rail, from Texas ports to Danville or to any other point in Illinois.

Q. In Paragraph 4 of the Complaint, the complainant refers to a reduction made in all rail rates on sulphur from Galveston and other Texas points and from Port Sulphur, Louisiana, to Danville. Did such a reduction ever take effect?

A. No. These rates were suspended in I&S Docket 5880, and in the proceedings have been cancelled.

Q. Have you prepared a rate history covering rates on sulphur between the points involved?

A. I have.

Mr. Day: That will be No. 3, won't it?

Exam. Wilkins: Yes.

(Defendant's Exhibit No. 3, Witness Sweet, was marked for identification.)

By Mr. Day:

Q. Will you proceed to explain your Exhibit No. 3.

A. My Exhibit No. 3 shows the history of the sulphur rates from East St. Louis, Illinois, to Joliet, and Danville, Illinois. It will be observed, effective May 11, 1936, $1.69 rate was established to Joliet, Illinois, to meet barge competition. However, this rate was not made applicable by the Railroad Company until June 15, 1936, at which [fol. 51] time the Joliet rate was applied to the Danville under the intermediate application of the tariff.

On March 14, 1945, the rate was published specifically to Danville on the Joliet basis. This rate, however, was not sufficiently low to secure the tonnage and some of the Illinois lines in order to meet Illinois River barge competition, further reduced the rate to $1.65 a gross ton. This rate, however, was suspended by I&S Docket 5499.

After hearing, the Commission found the $1.65 rate not justified and the $2.23 rate was continued in effect.

Since then, the various increases, the rate became $2.95 per gross ton to Joliet and Danville.

Q. What is the general basis of sulphur rates prevailing as an eastern factor, sulphur handled by eastern lines and eastern territory?

A. The exception rating of 23 and one half per cent.

Q. And what is the basis prevailing generally as the normal basis on sulphur from southwestern origins to destinations in official territory when moved all-rail?

A. Column 13 and one half.

Q. Has that basis been approved by the Commission?

A. It has.

Q. In some recent cases?

A. Yes.

[fol. 52] Q. Will you cite one or more of them?

A. Well, in the Marian case, in Docket 29856, 274 I.C.C. 493, involving rates on sulphur out of the Southwest to Indianapolis and Columbus, Ohio, they held Column 13½ was the normal, reasonable rate.

Q. What relation does the current all-rail rate have to the first class to Danville?

A. From Texas?

Q. From Texas producing——

A. It reflects 8.6 per cent of the current first class rate.

Q. And what is the present?

A. Forty-one cents a hundred.

Q. What is the relationship to first class to the rate to East St. Louis and to Danville?

A. That reflects 9.2 of the first class.

Q. Will you explain why the present all-rail rate from Galveston to Danville is depressed?

A. Well, the Southwestern Lines, under their emergency proposal 372, effective June 7, 1933, reduced their rates from Texas producing points and Port Sulphur, Louisiana to Chicago by seven and a half cents a hundred pounds, or 27½ cents, to meet barge competition. Through the various increases, this 27½ cents has come to being 41 cents current, today.

Q. In other words, the 27½ cent rate was established to Chicago, then applied to Danville under the intermediate [fol. 53] clause of the tariff?

A. That's right.

Q. And under the general increases in 123, 166, and 168, that rate has become 41 cents today?

A. Yes, sir.

Q. Will you explain the rate of $8.62 per gross ton from Texas producing points to Danville?

A. Effective December 24, 1950, in Supplement 57 to Southwestern Line Tariff 102, Line W, Agent Marsh I.C.C. 3862, carries issued rate of 38½ or 862 per gross ton on crude sulphur from Texas producing points and from Port Sulphur, Louisiana to Danville, Illinois, to meet barge competition. This rate was predicated on a waterway transportation incorporation charge of $4.65 per gross ton from Texas ports to East St. Louis, plus our $2.95 a gross ton from East St. Louis to Danville, added to the switching charges of 40 cents per gross ton of the Alton & Southern Railroad at St. Louis, Missouri, this produced a through barge-rail rate of $8.00 per gross ton.

Q. That 38½ cents you referred to was suspended by the Commission in I&S 5880 and subsequently withdrawn by the carrier?

A. That's right.

Q. While you are on that point, will you state the tariff

authority for the handling charge at East St. Louis in addition to the—you have the tariff with you?

A. It isn't a tariff. It is published by the Cooper Termi-
[fol. 54] nal, Inc. at East St. Louis.

Q. And the charge is——

A. Thirty-nine cents a net ton, or 44 cents a gross ton.

Q. And that is in addition to the transportation charges?

A. Yes, sir.

Mr. Belnap: Whose transportation charges?

Mr. Day: He gave you the reference to it.

Mr. Belnap: Whose transportation charge is that in addition to?

The Witness: Federal Barge and the railroad in connection with your $5.32 to East St. Louis mentioned a few minutes ago.

Mr. Belnap: Where is your tariff reference that that is in addition to the rate?

The Witness: Oh, that——

Mr. Belnap: That is the one you better find.

The Witness: Yes, sir. Supplement 49 to Federal Barge Tariff 66-U, I.C.C. No. 265, Item 980-D, is a $5.32 gross ton published from Galveston, Texas to East St. Louis, tagged with a circle reference No. 3 which reads as follows: (reading)

"The rate applies from in barge (See item 390 at origin) and will include switching charges lawfully on file with the Interstate Commerce Commission at East St. Louis or Memphis, Tennessee as the case may be."

Now, referring to Item 390 in the tariff, it says: (reading)
[fol. 55] "Rates are published for application from in barge or to in barge, such rates apply for line haul applications only and do not include cost of loading into barge at port or origin or unloading from barge at point of discharge, as the case may be, nor do they include switching other than terminal charges."

By Mr. Day:

Q. Wait a minute. You read that wrong. "Nor do they include switching or other terminal charge."

A. That's right. Circle 3 absorbs the switching but not the handling charge.

Mr. Belnap: It says when rates are published from in barge, certain things apply, and to in barge, certain things apply.

The Witness: That's right.

Mr. Belnap: You understand this is published to in barge?

The Witness: Sure.

Mr. Belnap: You can't read the tariff, sir.

Mr. Day: Now, I object to that. I think the witness is as capable of reading the tariff as anyone.

Mr. Belnap: I don't dispute his eye sight. I dispute his understanding of the words.

Mr. Day: Well, I disagree with you.

Mr. Belnap: Just looking at that same item you gave reference to, you find some of the rates in that item published to in barge, do you not, Mr. Witness?

The Witness: The $5.32 rate applies in barge from Gal- [fol. 56] veston, Texas to East St. Louis, Illinois.

Mr. Belnap: How does it apply to in barge? Is that the way you understand it?

Mr. Day: We can quibble about this all day.

Mr. Belnap: I would like to have the witness look at the tariff——

Mr. Day: I think we can argue in briefs if there is any question about the interpretation of it.

Mr. Belnap: I asked whether or not he finds some rates which are said to apply to in barge destination.

Exam. Wilkins: He can answer that.

Can't you?

By Mr. Day:

Q. Have you got the tariff there? Read the rate application please, to satisfy Mr. Belnap.

A. The aplication of 390, is that what you mean?

Q. The $5.32.

Mr. Belnap: Do you find some place in there they use the words "to in barge"?

Mr. Day: Don't let's get too far afield.

By Mr. Day:

Q. We are talking about the $5.32 rate on sulphur from Galveston to East St. Louis. Stick to that and tell Mr. Belnap what the tariff provides as to the application of that rate.

Mr. Belnap: You read Item 3, did you not?

The Witness: Yes.

[fol. 57] Mr. Day: And he read Item 390.

Mr. Belnap: I want him to contrast that application with Circle Reference 7, which reads to Dubuque, for instance.

Mr. Day: I object to that. We can't discuss every item in the tariff.

Mr. Belnap: I asked the witness to read me Circle 7 for the purpose of pointing out the difference in the language.

Mr. Day: I submit that is not involved; it is altogether immaterial and irrelevant. You question the witness' interpretation of the tariff, and in the interest of expediting the thing I permitted you to continue. I thought if there was anything stated in the tariff applying to this rate that wasn't clear to you, the witness would read the exact language of the tariff for you so you could understand it.

Mr. Belnap: I am asking the witness to contrast this language with another note to show how wrong ye : ar

Mr. Day: I object to going to Dubuque, Kansas City, Minneapolis or any place else. I don't think we are concerned with that. We are concerned with the rate from Galveston to East St. Louis.

Exam. Wilkins: Can you tell the Examiner; is that rate from Galveston to East St. Louis and state that it applies in barge to East St. Louis?

The Witness: Yes, that is the way it applies.

Exam. Wilkins: Let's have the language.

[fol. 58] The Witness: You have $5.32 rate into East St. Louis——

Mr. Rogers: I think we can straighten this out if you go off the record a few minutes.

Exam. Wilkins: Off the record.

(Discussion off the record.)

Exam. Wilkins: On the record.

Mr. Belnap: May the tariff be stipulated in by reference, the Federal Barge Line Tariff?

Exam. Wilkins: Is it filed with the Interstate Commerce Commission?

Mr. Belnap: Yes, sir.

Exam. Wilkins: Can you furnish the Examiner with a copy for ready reference?

Mr. Rogers: Since that situation has developed, may we also stipulate the American Barge Line Tariff?

Mr. Day: I submit that can be put on rebuttal if counsel wants to throw in some other tariffs. Let's not complicate this testimony any more.

Exam. Wilkins: Are you going to put it in in rebuttal?

Mr. Belnap: No, I am going to stipulate Oliphant's I.C.C. No. 265, stipulate the tariff in by reference.

Exam. Wilkins: Proceed—we will take a short recess.

(Short recess.)

Exam. Wilkins: We will resume, gentlemen.

By Mr. Day:

Q. Will you explain your statement marked——

[fol. 59] Exam. Wilkins: That is Exhibit 4.

(Defendant's Exhibit No. 4, Witness Sweet, was marked for identification.)

By Mr. Day:

Q. Will you explain your statement marked Exhibit 4 for identification.

A. My Exhibit No. 4 is a statement of rates ex barge on sulphur to destinations in Illinois and Indiana, and its purpose is to demonstrate the rate of $2.95 per gross ton from East St. Louis to Danville, Illinois, a distance of 181 miles is not unreasonable or out of line with other ex barge rates maintained to other destinations shown in the exhibit.

It will be noted the rate on 236 miles to Indianapolis is $6.50 per gross ton, and indicates that the Danville rate is a depressed rate.

Q. Did you make a study of the movement of sulphur

into Danville during the last six months of 1950?

A. I did.

Q. Via the New York Central Railroad?

A. Yes, sir. I called——

Q. And will you state whether the preponderance of that traffic came all-rail or barge-rail?

A. I secured the inbound expense bills——

Q. Just answer the question.

A. The preponderance was by barge up to East St. Louis and rail to Danville.

[fol. 60] Q. And that is for the New York Central Railroad?

A. Yes, sir.

Q. Do you understand the C&EI also has a substantial movement?

A. They did.

Mr. Day: I am asking him to save time and save the witness. Mr. McWilliams, a witness for C&EI is here and would so testify.

Mr. Belnap: That is satisfactory.

By Mr. Day:

Q. Now, take up your next exhibit.

Exam. Wilkins: That is No. 5.

(Defendant's Exhibit No. 5, Witness Sweet, was marked for identification.).

A. Exhibit No. 5 is a comparison of the barge-rail costs with the all-rail rate from Galveston, Texas to Danville, Illinois. By the route of the Waterways Transportation, Inc., contract carrier charge from Galveston to East St. Louis, including transfer from barge to cars is $4.65 a gross ton. Switching at East St. Louis, Illinois is 40 cents a gross ton. Rail charge from East St. Louis to Danville is $2.95 a gross ton, or through, $8.00 a gross ton.

The barge rate from Galveston to East St. Louis by the Federal Barge connection with the conjunction with Coyle or DCI barges from New Orleans, Federal——

By Mr. Day:

Q. DCI is the Dixie Line?

A. That's right.

[fol. 61] Q. Well, just give the aggregate figure; the items are shown on the exhibit.

A. $5.32, handling charge at East St. Louis 44 cents a gross ton——

Q. That is what Mr. Belnap doesn't agree with.

A. Rail charge of $2.95, or through charge of $8.71, compared with the all-rail to Danville, Illinois of $9.18.

Q. That is enough. The exhibit otherwise speaks for itself.

Take up your Exhibit 6 and make such explanation as you think necessary. You don't have to read the figures.

(Defendant's Exhibit No. 6, Witness Sweet, was marked for identification.)

A. Well, Exhibit 6 is a statement showing, or comparing the all-rail mileage with the barge-rail distance from Galveston, Texas, to East St. Louis and Danville, Illinois, indicating the percentage of circuity of the barge-rail distance over the all-rail distance. Short line by rail is 823 miles compared with the short line of 1,518 by the barge, or——

Q. You don't have to read that. That is all on there, Mr. Sweet.

A. You just want percentage of circuity?

Q. No, I think you have explained sufficiently what the exhibit is.

A Witness for the complainant referred to a differential of $1.01 Galveston over Port Sulphur. Is there any such [fol. 62] differential in connection with rail rates?

A. No, sir.

Q. To any destination?

A. No, sir.

Mr. Day: That is all.

Exam. Wilkins: Cross-examine.

Cross examination.

By Mr. Belnap:

Q. *Do the defendant railroads object to joining the complaining barge lines in through routes at a single factor joint rate on sulphur from Galveston by East St. Louis to Danville?*

A. I don't think so, if we get our $2.95 east of East St. Louis.

Q. You are willing to *join a single factor through rate?*

A. I wouldn't be in position to say that, but I don't think there would be any quarrel with lines east of East St. Louis if they get their $2.95.

Q. Is that a local rate?

A. It is a proportional rate, so to speak.

Q. Published as a proportional rate?

A. Published as an interstate rate, which has the same effect.

Q. Like the ordinary published international local rate?

A. The routes on the $2.95 are all interstate routes so the traffic has to come beyond East St. Louis to make it interstate.

Q. It is published as any other ordinary local rate?

A. That is true, for any interstate application.

[fol. 63] Q. Is that also true of all rates shown on your Exhibit 4 which you had as ex barge rates?

A. That's right.

Q. Just local rates?

A. That's right.

Q. Now, in making the through all-rail rates from Galveston to Danville in connection with your lines, do you add $2.95 to the rail rate up to East St. Louis to make the through charge?

A. That's right.

Q. That is the way you make it?

A. That's right.

Q. What is the rail rate to East St. Louis?

A. Oh, the rail rate; I thought you said the barge rate. We have a through rate from Texas producing points to Danville.

Q. $9.18 per gross ton?

EXHIBIT 2

PROPOSED RAIL ROUTES FROM NEW GULF, TEX.

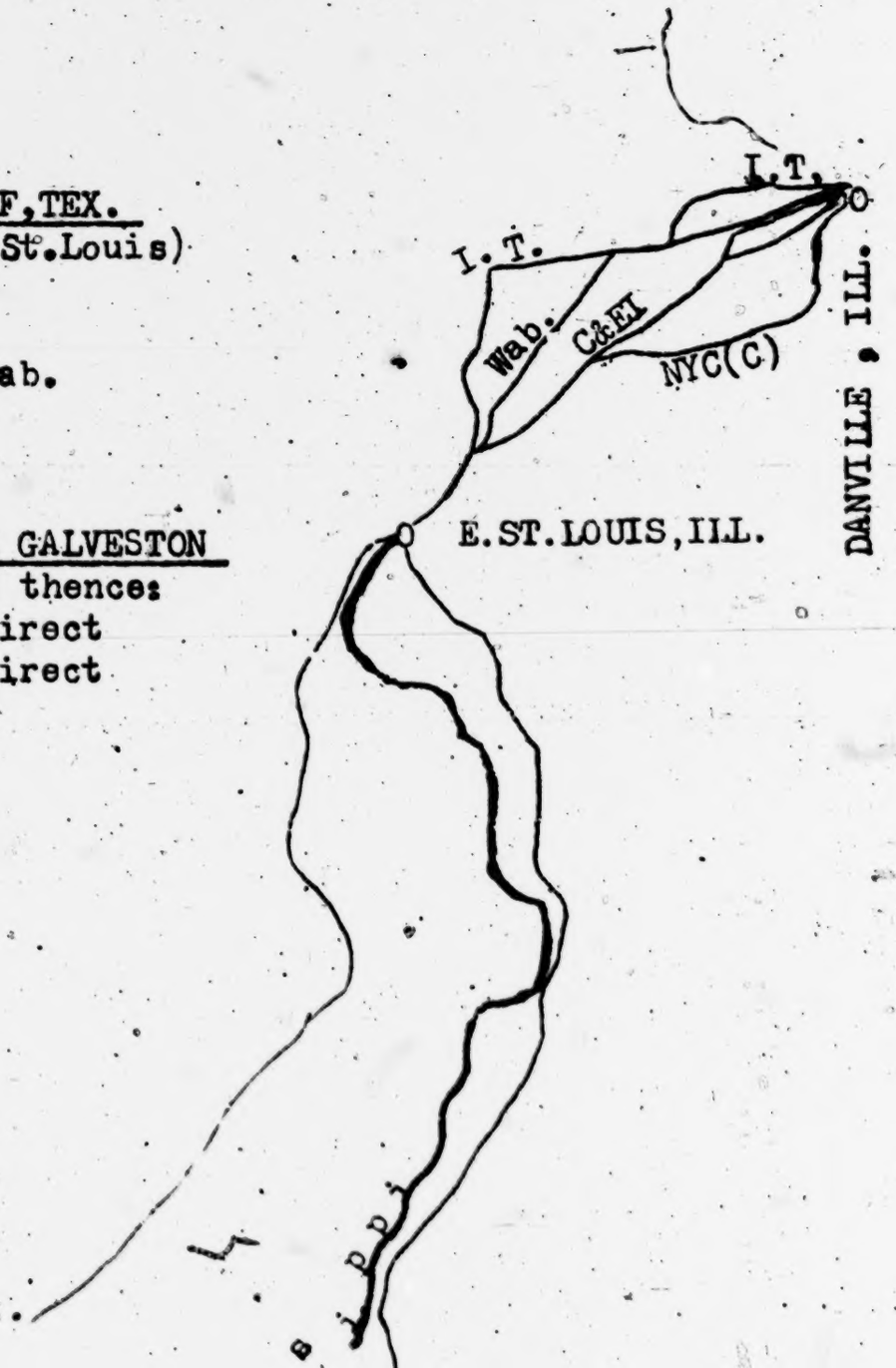
A - S.P.(Shreveport) T&P(Texarkana) MP(St.Louis) C&EI(Glover) IT

B - S.P.(New Orleans) IC (E.St.Louis) Wab.

PROPOSED CANAL-BARGE-RAIL ROUTES FROM GALVESTON

Canal (New Orleans) Barge (E.St.Louis) thence:

A - C&EI direct
B - I.T. direct
C - NYC(C) direct
D - Wabash direct



Q. Is the route from Galveston to Danville via New Orleans, thence via East St. Louis looked upon as a normal route if the rail lines were operating it?

A. I didn't understand the question.

Exam. Wilkins: Read the question.

(Question read.)

A. No. Oh, it could be considered as such, yes, sir.

Q. Just the usual type of route for that traffic?

A. Well, this sulphur traffic generally is routed through Thebes, Cairo, East St. Louis and Kansas City by the direct sulphur lines.

Mr. Belnap: That is all the questions I have.

[fol. 67] Exam. Wilkins: Any further questions on cross examination?

Mr. Macleay: I have one or two.

By Mr. Macleay:

Q. Referring to your Exhibit No. 5, do you have any tariff authority for the rate you quote there via Waterways Transportation, Inc.?

A. No, sir, that is a contract rate.

Q. Where did you get that information?

A. That information was the result—I mean, this particular rate was the result of the Southwestern Lines' filing their proposal for reduced rates to Danville.

Q. This was the result of your filing?

A. Southwestern Lines filing their proposal to reduce the rates to Danville, now on suspension 55-A. That was the factors used up to East St. Louis.

Q. You haven't told me where you obtained that rate quotation.

A. From the sources of the Southwestern Lines.

Mr. Day: It is in your files and records?

The Witness: Yes.

By Mr. Macleay:

Q. How did it get in your files and records? It is not a published rate of any kind, is it?

A. That's right. It is information we had from the

Southwestern Lines in justifying the reduction in the all-rail rate to Danville.

Q. That proposed reduction has been withdrawn?

A. That's right.

[fol. 68] Q. Is that because that competition has disappeared?

A. I don't know why the tariff was withdrawn.

Mr. Day: It was suspended. You know that.

The Witness: It was suspended.

By Mr. Macleay:

Q. Then it was withdrawn?

A. That's right.

Q. In other words, you are no longer trying to reduce your rates to meet this particular competition?

A. No, sir, trying, just trying to show there is $4.65 rate to East St. Louis.

Q. You can't give us any tariff authority there is any such rate?

A. It is a contract rate.

Q. There are contract rates on file with the Commission; aren't they?

A. Not that I know of.

Q. Don't you know minimum rate schedules of carriers having permits as contract carriers must be filed with the Commission?

A. Yes, file a minimum rate.

Q. You don't know whether or not there is any such rate on file with the Commission?

A. No.

Q. Do you know whether Waterways Transportation, Inc. has any rates on file with the Commission at the present time?

A. No, I don't.

[fol. 69] Q. Do you know whether or not Waterways Transportation, Inc. is in operation at the present time?

A. No, I don't. Just what I have in the files is all I have.

Q. And you don't know where this $4.65 quotation came from?

A. Yes, I told you where it came from.

Q. I mean, you don't know where the railroads obtained any such information?

A. No, sir.

Q. That is something some other railroad passed along to you?

A. The origin lines.

Mr. Day: To the destination lines?

The Witness: To the destination lines.

By Mr. Macleay:

Q. Not the origin lines handling it via Waterways Transportation.

A. No. The origin lines, the railroad lines that originate the sulphur.

Q. But you don't know where they obtained any such information?

A. No, sir.

Q. Referring to Exhibit 6—not that it has any real effect on the result of your percentages—but do you know that the Coyle Lines tariff 4 I.C.C. No. 4, which is the mileage tariff to which you apparently referred to get the distance from Galveston to New Orleans, was canceled several years ago?

A. That tariff is still on file with the Interstate Commerce Commission and that is where we obtained our information.

[fol. 70] Q. Physically filed but canceled?

A. It runs the same course.

Q. You know that mileage is not exactly accurate today.

Mr. Day: We will accept your figure.

Mr. Macleay: 354 miles from Galveston to New Orleans.

Exam. Wilkins: Instead of 363.

Mr. Belnap: Mr. Harmann gave the correct mileage from New Orleans to East St. Louis which is different from the mileage shown here.

Mr. Day: As I understand, you want to substitute 354 for 363.

Mr. Macleay: Merely for accuracy: Because this might be cited by someone else.

Mr. Day: And do you have the tariff authority for the 354?

Mr. Macleay: There is no tariff authority for those mileages today. The tariff setting forth the mileage was canceled and the Army Engineers' publications are now used to establish the mileages.

That is all I have. Thank you.

Exam. Wilkins: Any further questions?

By Mr. Rogers:

Q. On your Exhibit 5, you show the American Barge Line rate to East St. Louis as $5.32, and at the bottom, the authority as ABL Tariff I.C.C. 99. Do I understand that it is your contention that the East St. Louis rate is in that tariff which you cite?

[fol. 71] A. Well, I understood it was in that tariff.

Q. Did you examine that tariff?

A. I didn't personally, no, but under my supervision.

Q. I hand you this copy of the American Barge Line I.C.C. No. 99——

Mr. Day: Why don't you put that in yourself?

Mr. Rogers: I can do that.

Mr. Day: It is your tariff. You know more about that than he does.

Mr. Rogers: All right. I will be glad to do that.

Exam. Wilkins: Anything further? Any further questions on cross examination?

(No response.)

Exam. Wilkins: Redirect?

Mr. Day: Yes, sir, a couple.

Redirect examination.

By Mr. Day:

Q. You were questioned about the shipments of sulphur handled by barge during the last six months of 1950 and as to why you used that particular period. Was the notice of this hearing served on you in January of this year?

A. That's right, yes, sir.

Q. And you immediately set to work to prepare your defense to the complaint?

A. Yes, sir.

Q. Were those the latest figures available when you prepared this information?

[fol. 72] A. Yes, sir.

Q. Now, Mr. Sweet, you are not authorized to say that you will join in rates with the barge lines under any terms, are you?

A. That's right, yes sir.

Q. And do you want to retract what you stated to Mr. Belnap about being willing to accept a division of the rate?

A. I said I didn't think the carriers would quibble; but this would have to be legislated by the Illinois roads before the establishment of any through rate could be published.

Q. And you are not authorized to say you will join in through rates under any terms or conditions?

A. That is absolutely right.

Mr. Day: That is all.

Recross-examination.

By Mr. Belnap:

Q. Are you authorized to state the basis of the objections the carriers have to joining a through rate?

A. No, sir.

Q. You aren't authorized to state those?

A. No, sir.

Q. So you haven't stated any?

Mr. Day: He has just prepared the defense to this complaint.

Exam. Wilkins: These exhibits, 3 through 6, are received [fol. 73] in evidence and so marked.

(Defendant's Exhibits Nos. 3 through 6, inclusive, Witness Sweet, were received in evidence.)

Exam. Wilkins: You are excused.

Witness excused.

GEORGE T. BARRY was sworn and testified as follows:

Direct examination.

By Mr. Day:

Q. State your name, occupation and place of address.

A. George T. Barry, 1463 Railway Exchange Building, St. Louis, Missouri. I am commerce agent of the Wabash Railroad Company, and I have been in the employ of the Railroad for about 32 years, entirely in the traffic department.

Q. Having to do with rates and tariffs?

A. Yes. Practically all my experience, with the exception of about five years, was having to do with rates and tariffs. And those five years I was in solicitation.

Q. You are familiar with the rates involved in this case?

A. I am.

Q. Have you prepared an exhibit?

A. Yes, I have. And I would like to make some corrections at this time.

Exam. Wilkins: It will be marked Exhibit No. 7 for identification.

[fol. 74] (Defendant's Exhibit No. 7, Witness Barry, was marked for identification.)

A. (Continued:) The correction is, please eliminate the star references under the route in the last column, and that route 15 there, as shown in the original tariff is via Wabash.

My Exhibit No. 7 is an excerpt from Supplement 1 to Wabash I.C.C. 723, effective January 12, 1951, showing $2.95 rate on sulphur from East St. Louis, Illinois to Danville, Illinois, which is the amount Wabash, apparently, receives on sulphur carloads from East St. Louis, Illinois to Danville, Illinois on shipments of sulphur originating at Galveston, Texas and moving by the barge lines or water routes to East St. Louis, Illinois. We are—the Wabash is opposed to the establishment of a barge-rail rate, a joint barge-rail rate for the reason we are fearful this will have the effect of reducing our present revenue of $2.95.

Q. Have you authority to agree to a joint barge-rail rate under any division or conditions?

A. I have no authority to do any such thing, Mr. Day.

Q. Your instructions were to defend the $2.95 rate?

A. That is correct.

Q. And your company participates in some barge-rail movement to Danville, do they?

A. Yes, we do.

Mr. Day: That's all.

[fol. 75] Exam. Wilkins: Any questions?

Cross-examination.

By Mr. Belnap:

Q. In making all-rail rates to Danville, do you add your local rate of $2.95 in making that through rate?

A. No, sir, we do not.

Q. But you would like to do that with the water lines?

A. Well, we want $2.95.

Q. From the water lines, water traffic?

A. We want this $2.95; this is what we want.

Q. If it moves by barge, you want $2.95?

A. We want $2.95.

Q. That is, you will do something different if it moves by rail?

A. I don't know what we might do if it moves by rail.

Q. Isn't traffic moving today by rail?

A. Yes.

Q. And do you demand $2.95 on that all-rail traffic?

A. I imagine; I don't know.

Q. But you don't make your through rate by adding that $2.95?

A. That is true.

Mr. Belnap: That's all.

Exam. Wilkins: Any further questions?

(No response.)

Exam. Wilkins: If not, Exhibit 7 is received in evidence and so marked.

[fol. 76] (Defendant's Exhibit No. 7, Witness Barry, was received in evidence.)

Exam. Wilkins: You are excused.

(Witness excused.)

Mr. Day: If the position of the defendants on this question isn't clear, Mr. Examiner, I would like to state the defendants are definitely opposed to entering into joint rate arrangements with the barge lines.

Exam. Wilkins: Anything further to be presented?

Mr. Belnap: That's all.

Exam. Wilkins: Are the parties finished with the presentation?

Mr. Day: Yes.

Exam. Wilkins: Will the parties desire a proposed report?

Mr. Day: Yes, sir.

Exam. Wilkins: Proposed report will be issued.

Do the parties desire to file briefs?

Mr. Day: Yes, sir.

Exam. Wilkins: What time do you require for filing briefs?

Mr. Belnap: Sixty days.

Mr. Day: Yes, I say "amen" to that.

Mr. Belnap: May 20 or May 21.

Mr. Day: Defendants join in that request.

Exam. Wilkins: Let the record show because of commitments of counsel, they indicate it is necessary that briefs not be filed before May 21, therefore, the date for briefs [fol. 77] is fixed for May 21.

If there is nothing further, the hearing in this proceeding is closed.

(Whereupon, at 4:30 p.m., the hearing in the above-entitled matter was closed.)

[fol. 78]

EXHIBIT 1

Present Rates
(in cents per ton of 2,240 pounds)
on
Sulphur (Brimstone)
Crude (Unground and Unrefined)
(Minimum weight 500 tons of 2,240 pounds, except as noted)

To	From	Barge-Rail Rate	Barge-Rail Route	All-Rail Rates From Port Sulphur, La.	All-Rail Rates From Galveston, Tex.
Chicago, Ill.				918.4	918.4
Chicago Heights, Ill.				918.4	918.4
Dyer, Ind.				[2]	1187.2
East Chicago, Ind.				918.4	918.4
Gary, Ind.		672	c, e	918.4	918.4
Hammond, Ind.	New Orleans, La.			918.4	918.4
Hartsdale, Ind.	Baton Rouge, La.			918.4	918.4
Indiana Harbor, Ind.				918.4	918.4
South Chicago, Ill.				918.4	918.4
East St. Louis, Ill.		[1] 460	c	873.6	873.6
Mooar, Ia.		[1] 785	e	918.4	918.4
Clinton, Ia.		778	e	918.4	918.4
Dubuque, Ia.		[1] 778	c, e	918.4	918.4
Chicago Heights, Ill. Danville, Ill. Joliet, Ill. LaSalle, Ill. Streator, Ill.	Port Sulphur, La.	666	e	918.4	918.4

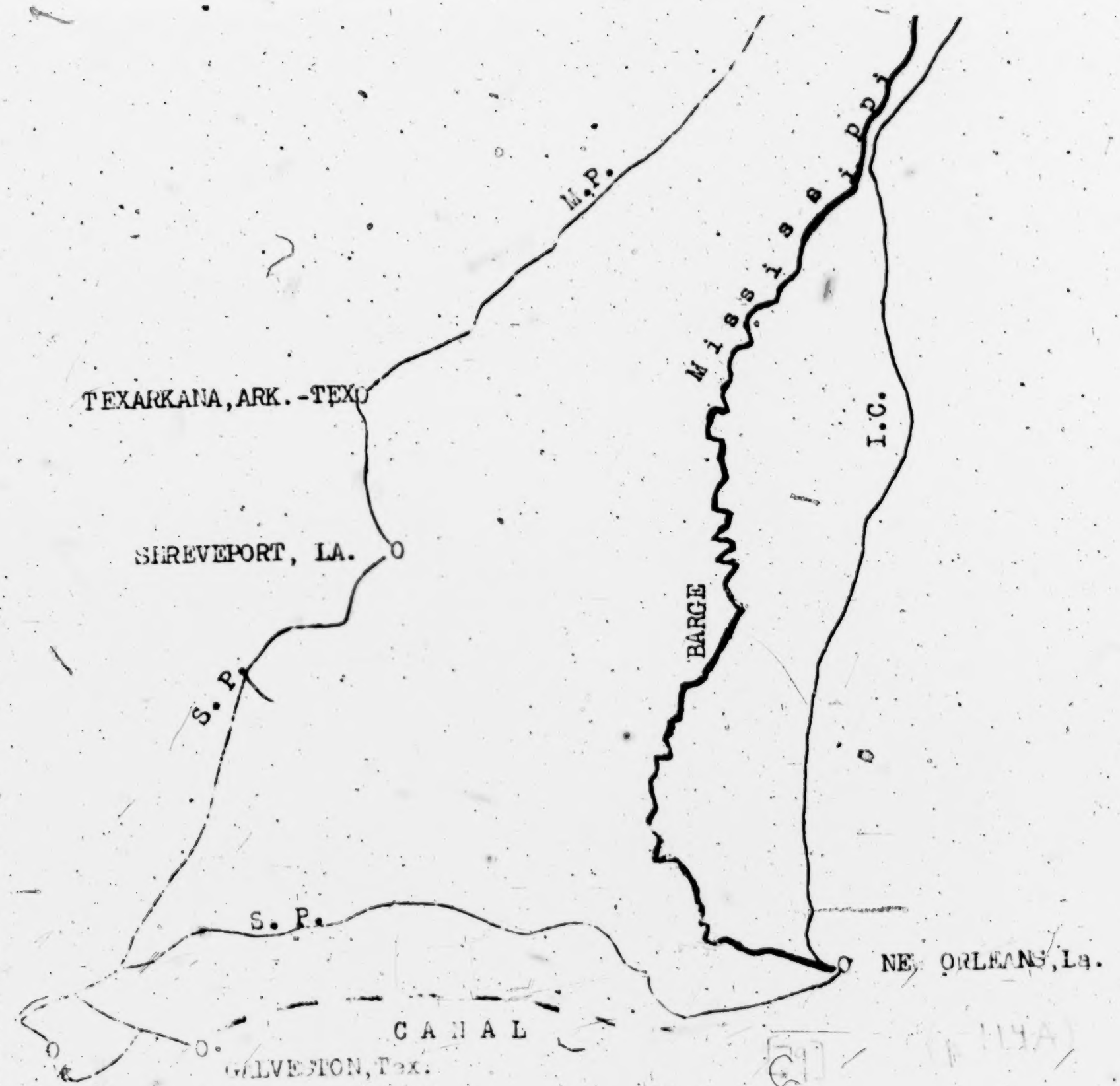
[1] Minimum weight: 1,500 tons of 2,240 pounds.
[2] Class basis only.

Route c—Via FBL (Cairo, Ill.) rail lines.
Route e—Via FBL (East St. Louis, Ill.) rail lines.

Tariff Authority

F.B.L.-F.T. No. 27-J, I.C.C. No. 283.
S.W.L. F.T. No. 102-W, Agent D. Q. Marsh's I.C.C. No. 3682

(Here follows 1 Photolithograph, side folio 79)


M.P.
TEXARKANA, ARK.-TEX
SHREVEPORT, LA.
S. P.
S. P.
Mississippi
I.C.
BARGE
NEW ORLEANS, La.
CANAL
GALVESTON, Tex.

[fol. 80] EXHIBIT 3

Chronological History
of
Interstate Rates on Sulphur (Brimstone), Crude (Ungroind and Unrefined) In Bulk, Minimum Weight 89,600 Pounds, From East St. Louis, Ill. To Danville and Joliet, Ill.

Date	Destination		Rate in Cents Per Gross Ton	Authority
5/11/36	Joliet	Ill.	169	Item 3375, Supp. 53, Agent Raasch's I.C.C. No. 286.
6/15/36	Joliet	Ill.	169	Item 3375-A, Supp. 54, Agent Raasch's I.C.C. No. 286.
	Danville, Ill, Intermediate			
3/28/38	Joliet	Ill.	186	Supplement No. 17, Agent
Ex Parte 123	Danville, Ill. Intermediate			Raasch's I.C.C. No. 371.
3/18/42	Joliet	Ill.	197	Supplement No. 36, Agent
Ex Parte 148	Danville, Ill. Intermediate			Raasch's I.C.C. No. 481.
5/15/43	Joliet	Ill.	186	Supplement No. 14, Agent
Ex Parte 148	Danville, Ill. Intermediate			Raasch's I.C.C. No. 538.
Suspended				
3/14/45	Joliet	Ill.	186	Item 4680-E, Supp. 52,
	Danville	Ill.		Raasch's I.C.C. No. 538.
7/1/46	Joliet	Ill.	197	Supplement 78, Agent
Ex Parte 148	Danville	Ill.		Raasch's I.C.C. No. 538.
Reinstated				
1/1/47	Joliet	Ill.	223	Supplement No. 92, Agent
Ex Parte 162-A	Danville	Ill.		Raasch's I.C.C. No. 538.
5/28/47	Joliet	Ill.	223	Item 4680-G, Supp. 96, Agent
	Danville	Ill.		Raasch's I.C.C. No. 538.
5/28/47	Joliet	Ill.	165	Item 4681, Supp 96, Agent
				Raasch's I.C.C. No. 538.
6/5/47	Joliet	Ill.	165	Suspended by I&S 5499. Supp. 99, Raasch's ICC 538.
10/13/47	Joliet	Ill.	223	Supplement No. 105, Agent
Ex Parte 166	Danville	Ill.	plus 10%	Raasch's I.C.C. No. 538.
1/5/48	Joliet	Ill.	223	Supplement No. 108, Agent
Ex Parte 166	Danville	Ill.	plus 20%	Raasch's I.C.C. No. 538.
5/6/48	Joliet	Ill.	245	Supplement No. 116, Agent
Ex Parte 166-A	Danville	Ill.		Raasch's I.C.C. No. 538.
8/21/48	Joliet	Ill.	268	Supplement No. 120, Agent
Ex Parte 166-B	Danville	Ill.		Raasch's I.C.C. No. 538.
1/11/49	Joliet	Ill.	268	Supplement No. 129, Agent
Ex Parte 168	Danville	Ill.	plus 6%	Raasch's I.C.C. No. 538.
9/1/49	Joliet	Ill.	295	Supplement No. 9, Agent
Ex Parte 168-A	Danville	Ill.		Raasch's I.C.C. No. 659.

(A)

[fol. 81]

EXHIBIT 4

Statement of Rates on Sulphur
Ex Barge to Destinations in Central Territory

From	To		Distance	Rate Per Gross Ton
East St. Louis, Ill.	Danville	Ill.	181	82 95
" "	Decatur	Ill.	107	2 95
" "	Springfield	Ill.	90	2 95
" "	Kankakee	Ill.	220	4 93
" "	Streator	Ill.	196	4 93
" "	Indianapolis	Ind.	236	6 50
" "	LaFayette	Ind.	228	6 50
" "	Terre Haute	Ind.	165	5 82
" "	Crawfordsville	Ind.	217	6 50
Joliet, Ill.	Kalamazoo	Mich.	149	5 38
"	Kendallville	Ind.	151	5 60
"	South Bend	Ind.	98	4 70
"	Fort Wayne	Ind.	157	5 60

Tariff Authority
C.T.R. Tariff 484, I.C.C. No. 2448.
C.T.R. Tariff 483, I.C.C. No. 2447.
C.T.R. Tariff 130-C, I.C.C. No. 3936.
B&O Mileage Tariff I.C.C. 23392.
C&EI Mileage Tariff 3-A, I.C.C. No. 40.
CB&Q Mileage Tariff 9000-D, I.C.C. No. 20147.
CI&L Mileage Tariff 1150-D, I.C.C. 1150-D.
EJ&E Mileage Tariff 106-C, I.C.C. No. 2199.
GTW Mileage Tariff 526-C, I.C.C. A-2960.
GM&O Mileage Tariff 3001-A, I.C.C. No. 130.
IC Mileage Tariff 13131-D, I.C.C. A-11599.
Ill. Term. Mileage Tariff 365-F, I.C.C. No. 8.
NYC&StL Mileage Tariff 264-J, I.C.C. No. 5978.
PRR Mileage Tariff 500-B, I.C.C. 2950.
Wabash RR Mileage Tariff B-15221, I.C.C. 6442.

(B)

[fol. 82]

EXHIBIT 5

Comparison
of
Barge-Rail Costs With All-Rail Rate
From Galveston, Tex. to Danville, Ill.

Barge-Rail Costs		Per G. T.
Waterways Transportation, Inc., Contract Carrier Charge from Galveston to East St. Louis, including transfer from barge to cars		$4.65
Switching at East St. Louis		.40
Rail Charge from East St. Louis to Danville		2.95
	Through	$8.00
Barge Rate from Galveston to East St. Louis Coyle or DCI, New Orleans, La., Federal or American Barge Line		$5.32
Handling Charge at East St. Louis		.44
Rail Charge from East St. Louis to Danville		2.95
	Through	$8.71
All-Rail Rate		
Galveston to Danville, Ill.		$9.18

* * * * * *

Barge-Rail Differentials Under All-Rail Rate ..... $1.18 and 47 cents

* * * * * *

Tariff Authorities:

Agent R. G. Raasch's Tariff I.C.C. No. 659.
Wabash R.R. Tariff I.C.C. No. 7623.
Federal Barge Line Tariff I.C.C. No. 265.
American Barge Line Tariff I.C.C. No. 99.
Agent D. Q. Marsh's Switching Tariff I.C.C. No. 3813.

(C)

[fol. 83] EXHIBIT 6

Statement

Comparing the All-Rail Mileage with the Barge-Rail Distance from Galveston, Tex. to East St. Louis and Danville, Ill., Indicating the Percentage of Circuity of the Barge-Rail Distance Over the All-Rail Distance.

East St. Louis, Ill.		
Short-Line Rail Distance	823	
Via Barge		
Coyle Lines, Galveston, Tex. to New Orleans, La.	363	
Federal Barge Lines, New Orleans to East St. Louis	1155	
	1518	
Percentage of Circuity		84.5
Short-Line Tariff Route Mileage		
Route 15181—T&NO, Shreveport, La., T&P, Texarkana, La., MP RR	850	
Percentage of Circuity		78.6
Danville, Ill.		
Short-Line Rail Distance	977	
Barge-East St. Louis-Rail	1702	
Percentage of Circuity		74.2
Short-Line Tariff Route Mileage T&NO, Shreveport, La., T&P; Texarkana, La., MP, East St. Louis, Wab.	1034	
Percentage of Circuity		64.6

Tariff Authority:

S.W.L. Mileage Tariff 4-E, I.C.C. No. 3926.
Wabash Mileage Tariff B-15221, I.C.C. No. 6442.
Coyle Line Tariff 4, I.C.C. No. 4.
Federal Barge Line Tariff, 9-I, I.C.C. 187.
S.W.L. Tariff 102-W, I.C.C. No. 3862.
C&EI Mileage Tariff 3-A, I.C.C. No. 40.
IC Mileage Tariff 13131-D, I.C.C. No. 11599.
NYC&StL Mileage Tariff 264-J, I.C.C. No. 5978.
Wabash R.R. Mileage Tariff B-15221, I.C.C. 6442.

[fol. 84] EXHIBIT 7

Excerpt From
Supplement No. 1
to

Ill.C.C. No. 1186 Wabash I.C.C. No. 7623

Effective January 12, 1951

Item No.	Commodity	From	To	Rate	Route
970-A Cancels 970	Sulphur (Brimstone), crude ungrounded and unrefined, in bulk. Minimum weight 89,600 lbs. Rates in cents per gross ton of 2,240 lbs.	East St. Louis, Ill.	Danville, Ill.	295	15

* "No switching charges at East St. Louis, Ill. will be absorbed."

* Increase.

[fol. 85] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 30731

AMERICAN BARGE LINE COMPANY, ET AL.

v.

CHICAGO AND EASTERN ILLINOIS R. R. CO., ET AL.

Stenographer's Minutes of November 4, 1953

Hearing Room A,
Interstate Commerce Commission,
Washington, D.C.

The above-entitled matter came on for oral argument before the Commission at 10 o'clock a. m.

Present: Chairman Johnson (Presiding), Commissioners Mahaffie, Alldredge, Mitchell, Cross, Knudson, Elliott, Clarke, Freas, and Tuggle.

APPEARANCES:

WESLEY A. ROGERS, P.O. Box 510, Jeffersonville, Indiana, appearing for American Barge Line Co.

NUEL D. BELNAP, 2106 Field Bldg., Chicago 3, Illinois, appearing for Federal Barge Lines, Inc., successor to Inland Waterways Corporation, Complainant.

DONALD MACLEAY, 1625 K St., N.W., Washington, D.C., appearing for Coyle Lines, Inc., and Dixie Carriers, Inc.

JOHN H. EISENHART, JR., 1319 F St., N.W., Washington, D.C., appearing for American Waterways Operators, Inc.

[fol. 85a] JOHN A. DAILY, 122 LaSalle St. Station, Chicago 5, Illinois, appearing for defendants.

[fol. 86] PROCEEDINGS

Chairman Johnson: The Commission will hear argument this morning in No. 30731, American Barge Line Company, et al, vs. Chicago and Eastern Illinois Railroad Company, et al.

I notice 65 minutes for Mr. Belnap, Mr. Rogers, Mr. Macleay and Mr. Eisenhart. I presume you gentlemen have

divided your time among you so we will not have to take charge of that until after 65 minutes have expired.

Mr. Rogers.

ARGUMENT OF WESLEY ROGERS

Mr. Rogers: May it please the Honorable Commission, I am Wesley A. Rogers, representing the American Barge Line Company, a complainant.

Our petition for reopening states the facts in detail.

In aid of understanding, a map has been prepared, showing the various rates and charges via the routes involved.

I will discuss the facts shown by the map from the practical aspect as we believe they create actual discrimination.

Mr. Belnap will discuss the laws applied by the Commission in past cases, and its application to the facts of this case.

Mr. Macleay will discuss the legal aspect of the extension of an existing through route.

Mr. Eisenhart will discuss the matter of the public interest.

[fol. 87] I would like to call your attention to the map:

New Gulf, Texas, in the lower-left-hand corner, designated by the letter "A" is one of the rail shipping points of sulphur which, among other destinations, moves to Danville, designated by point E in the upper right-hand corner.

The all-rail rate via "D", East St. Louis, from A to E, is $9.184 per gross ton.

"B" is the shipping point by water of sulphur from the mines in Texas.

From B to E, via D, St. Louis, or East St. Louis, there is a rate proposed by complainants in this case, of $7.67 per gross ton.

There is in effect a rate from C to E via D, and beyond D, via the lines of defendants in this proceedings, a joint rate of $6.66.

Our proposal of $7.67 is based by the addition of $1.01 to that existing $6.66 rate. The $1.01 represents the difference in the barge-load rate schedules from point B to ports and points served directly by the barge lines along the Mississippi and Illinois waterways.

Under that rate of $6.66, on which we have predicated our

proposal, the railroads accept $2.26 for their service from D to F.

For their service on the all-rail routes, from A to E, via D, and for their service from D to E, they accept some undisclosed figure in the nature of a division, which is not [fol. 88] revealed by the record.

From B to D, East St. Louis, the point of delivery to rail carriers, the barge lines maintain a rate of $5.32. That includes a delivery to the defendants, the absorption by the barge lines of car rental charge and the necessary switch delivery.

The defendants maintain from D to E a rate of $2.95, or a total of $8.27.

We believe that the discrimination in this case appears from the fact that the defendants from D to E maintain at least two and probably three different charges for their service from D to E, one of which is the $2.26 division, that they accept from the barge lines under the through rate from C to F, via D. The other is their local rate, which the record indicates was established by them as a sort of proportional rate to apply on barge traffic, of $2.95.

The third figure is the charge or division that they accept from their railroad connections at D, on traffic moving from A to F, via D.

Commr. Mahaffie: What is the rail rate from A to E?

Mr. Rogers: That is $9.184 indicated on the first line of the map exhibit in the left-hand corner.

In concluding, I wish to stress the fact that this case is a case between two sets of carriers. In connection with this case, we feel that a division of such a rate is of vital im- [fol. 89] portance. We are familiar with the cases which hold generally that divisions are not material in connection with the matter of the establishment of proper rates. However, those cases in the main, I believe, dealt with relations between shippers on the one hand and carriers on the other. Under those cases, of course, the matter of how the carriers divide the rate among themselves is not material, but here we have two sets of rail carriers, by agreement, as to their charge for the same service, eliminating a competing form of transportation with respect to the barge movement from B to D.

Thank you.

Commr. Clarke: Under your proposal who would absorb the unloading charges at point D?

Mr. Rogers: The barge lines.

Chairman Johnson: Mr. Belnap.

ARGUMENT OF NUEL D. BELNAP

Mr. Belnap: If the Commission please, I speak on behalf of Federal Barge Lines, Inc., which is a successor to the Inland Waterways Corporation, a complainant.

I am having laid before Your Honors a table of rates, to which I shall have occasion to refer in the course of my argument. My argument will be primarily confined to the issue which arises under paragraph 4 of Section 3 of the Act, which prohibits discrimination as between connecting carriers and by definition makes a barge line a connecting [fol. 90] carrier of railroads.

In connection with the authorities on which I shall rely, I have for your ready convenience and reference also laid before you an argument memorandum B, with a supplement. The supplement simply indicates I forgot something when I did the first one, which collects the cases on which the complainants rely, in support of their claim for relief under paragraph 4 of section 3.

As stated, that provision in the Act prohibits discrimination as between connecting carriers in the matters of rates, fares or charges.

An issue under that section of the Act raises three questions:

The first question is purely a question of fact, and is, is there a difference in treatment as between connecting carriers in the matter of rates or charges.

The second question is one purely of law. If there is such a difference in treatment in rates and charges as between connecting carriers, does the difference shown constitute discrimination within the meaning of the section in the absence of a showing, an affirmative showing by the defendants of just cause. That is, legitimate reason.

The third question is a mixed question of law and fact. If it be found that there is a difference in rates or charges, that the difference is offensive to paragraph 4 of section 3, [fol. 91] in the absence of a showing of just cause, we then are confronted with the mixed question of law and fact

as to whether the record shows on behalf of the defendants a just cause, a legitimate reason for the difference in treatment.

Addressing myself first to the first question, the question of fact:

There are these differences shown by the record and the differences are not disputed. As Mr. Rogers pointed out, we have in connection with the barge-rail through route, which presently exists, a local rate of $2.95, maintained by these eastern lines, operating from East St. Louis to Danville, and in comparison therewith, they take out of the joint rate with railroads of $9.18, a division, which while the amount is not known, the report does show is lower than the $2.95 local rate.

The second difference in treatment involves this; and I put it on the board, in connection with the barge-rail route. They assess the full combination, $5.32 to East St. Louis, $2.95 from East St. Louis to Danville, a total of $8.27.

In the case of the all-rail through route from Galveston, if they did assess the full combination, it would amount to $11.68, $8.73 fo East St. Louis, $2.95 local rate beyond, a total of $11.68, but they don't assess a full combination when it comes to their favored connections, the southwestern railroads. They participate in a joint rate $2.50 lowgr.

[fol. 92] Commr. Alldredge: Is this correct, to say as you do in your argument memorandum A, in Item 5, that the present combination rate, rail and barge, is a joint rate?

Mr. Belnap: That is from Port Sulphur only. Perhaps it hasn't been made clear that this case involves only rates from Galveston. The rates I have been talking about apply only from Galveston as an origin and from Galveston as an origin I have called your attention to the difference in treatment, the full combination on the one hand and a joint rate $2.50 below the full combination on the other.

Now, Mr. Commissioner Alldredge, the point to which you direct attention from the argument memorandum A brings me to my third differentiation in fact, and that relates to this:

From Port Sulphur, Louisiana, an important shipping point, these eastern railroads join the barge lines in a joint rate of $6.66. They also join the all-rail lines in a joint

rate from that origin. When it comes to Galveston, they join in joint rates with rail lines only. There is that difference in treatment, as between the origins from which these eastern lines, the defendant, maintain this joint rate arrangement.

Now, all of these facts are shown in the recitals in the report of Division 3. None of them happen to be characterized in specific terms in that report as differences in treatment of connecting carriers, with respect to rates or charges, but obviously, as a matter of fact, they constitute just that.

[fol. 93] Commr. Cross: What is the all-rail rate from Port Sulphur, Louisiana, to Danville?

Mr. Belnap: $9.18. The rail lines blanket the two origins. The barge lines do not.

Commr. Cross: I thought that was the all-rail rate.

Mr. Belnap: Maybe I misunderstood you, sir.

Commr. Cross: I said from Port Sulphur, Louisiana, to Danville, the all-rail rate.

Mr. Belnap: $9.18 shown in line 2, column 4.

Commr. Cross: The same as from New Gulf, Texas?

Mr. Belnap: Or Galveston, yes. That is an origin blanket for railroads.

Commr. Mahaffie: Are the shippers at New Galveston or Galveston complaining about this Port Sulphur situation?

Mr. Belnap: The Galveston Chamber of Commerce intervened in support of the complaint. I am not addressing myself, Mr. Commissioner, to the interests of shippers in this adjustment. I am addressing myself purely to the question of discrimination as between connecting carriers, but the Galveston Chamber of Commerce does support the complaint and introduced evidence seeking the joint rate as representative of the port interests.

Commr. Mahaffie: Did they claim Galveston is discriminated against by this Port Sulphur arrangement?

Mr. Belnap: I don't recall whether in terms they said so or not. They seek the joint rate which we propose, so [fol. 94] they would be $1.01 over Port Sulphur, as is the fact in connection with the port to port rates of the barge lines.

Having established, if you please, the difference in treat-

ment as to rates as between connecting lines is a matter of fact, a question of fact, I then come to the second question raised by the issues under Section 3 (4) and that is, are these acknowledged differences in treatment offensive to the prohibition in paragraph 4 of section 3, in the absence of affirmative showing by the defendants of just cause.

On this question of law, the most important question in the case, no light is thrown by the report of Division 3. The report on this point contains nothing but a negative finding, and I read it, from Sheet 4:

> "The record before us affords no basis for a finding of unlawful discrimination under Section 3 (4) of the Act."

There is no reasoning, there is no explanation, there is no why's; there is no wherefore's.

My purpose at this point is to take up each one of these three factual differences in treatment in turn and point out why they constitute a violation of the section.

As I said, this is purely a question of statutory construction, purely a question of law.

First, as to the local rate in the one case, and a division below the local rate in another: Obviously that cannot constitute a violation of Section 3 (4), unless the division of a [fol. 95] through rate is, as a matter of law, a charge within the meaning of Section 3 (4) and on that point, I call to your attention the decision of the full Commission in the Western Pacific case, which is in my memorandum B, in 55 ICC, which case turned squarely on that question of law. That case did not involve issues like this. It involved the question of a difference in divisions as between connecting carriers. The complaint was brought only under Section 3. It was paragraph 2 at that time, but the same provisions as are now in paragraph 4.

At the outset, in determining its jurisdiction and power, it was necessary for the Commission to say whether a division of a joint fare, passenger fares, whether a division of a joint fare is a charge within the meaning of Section 3 of the Act, in so far as that prohibition of discrimination in charges as between connecting carriers.

With two dissents, Commissioners Hall and Daniels, the

Commission held it was. In the opinion of the majority, these are the words:

> "The expression of rates and charges in the form of divisions makes them none the less rates and charges which may be discriminatory."

In the concurring opinion of Commissioner Eastman, he phrased it thus, having pointed out that a division is not collected as such from a shipper or a passenger, that the [fol. 96] rate or fare is collected as a whole, and the collecting carrier in such collection acts merely as the agent of the connecting carriers who finally get the divisions. He said:

> "So that the passenger or shipper is not obliged to make separate payments to each, does not make the division any the less a charge for the service rendered, although perhaps not a charge within the meaning of certain other sections of the Act."

Undoubtedly he had particularly in mind Section 6.

The complainants in this case ask you to reaffirm your holding of law in the Western Pacific case. If that holding of law is reaffirmed, it must necessarily follow that the complainants are entitled to the relief which they seek.

Now I come to the second difference in treatment of connecting carriers in the matter of rates and that is this full combination in the one case, as compared with a joint rate, $2.50 below the combination in the other.

That was also ruled on in the Western Pacific case, if you please, and in the argument memorandum before you are quotes both from the opinion of the majority, the concurring opinion of Commissioner Eastman, in which it was said that if a rail line admits one connection to a joint rate arrangement, without admitting another to an equally as favorable arrangement, that difference in treatment is also a violation of Section 3 (4).

[fol. 97] Commr. Alldredge: On your memorandum B, you quote at the bottom of it from the Western Pacific case, decided by the Commission.

Mr. Belnap: Yes, sir.

Commr. Alldredge: Do you recall whether that was decided before the Act was amended in 1920?

Mr. Belnap: Yes, sir, it was.

Commr. Alldredge: Is the Commission still limited—

Mr. Belnap: The Commission now has greater powers over divisions, but the prohibition in Section 3, as to discrimination as between connecting carriers, has not been changed.

Commr. Alldredge: Is it still right to say that the carrier can make a rate lower than the Commission can prescribe?

Mr. Belnap: No, on the minimum rate. You now have minimum rate authority.

Commr. Alldredge: That is what this quotation says here.

Mr. Belnap: I want to get to that.

There is a question of whether a depressed rate relieves you from power to relieve discrimination. That was the only point I have in this supplement to Memorandum B, is on that point.

Now I want to call your attention to another case in which, as here, there was an existing through route over which the full combination was maintained for one set of carriers, whereas in connection with another set of carriers, via com- [fol. 98] petitive junction, there was less than the full combination. That is the Ann Arbor case; in 136 ICC, involving rates from the east to the west, via Chicago on the one hand, the preferred junction, and via car-ferrying routes through west bank Lake Michigan points where the C. & O. and the N. & W. refused to join in less than the full combination.

There the question was raised that there was no shipper in the case to show public interest. The Commission said that is not necessary. We have here a through route. We have here a difference in treatment as between connecting carriers. That difference in treatment is discriminatory to the extent that the car-ferrying routes are not provided with joint rates on as favorable a basis as the routes through Chicago.

That is an all-rail case.

We have on this very point a leading case involving barge-rail rates, which was brought by the predecessor of Federal Barge Lines, Inc., and that is the U.S. War Department, at the time they conducted these barge operations. It is a case

reported in 92 ICC. It is an opinion by the entire Commission, without dissent. The opinion was written by Commissioner Eastman. The rates involved were sug..r. The barge lines sought additional joint rates on sugar, to correspond with the joint rates, and be differentially less than the joint rates maintained in connection with rail lines via the same junctions.

[fol. 99] The case was brought as a matter of reasonableness as well as a matter of discrimination between connecting lines. At that time, this Commission had no power over barge-rail rates, except to fix maximum rates. The sugar rates were depressed. The Commission held that it was under those circumstances without evidence to prescribe a rate under paragraph 3 of section 15. Consequently, it turned to paragraph——it was then 3, now 4, of section 3, in a carefully reasoned opinion from which I quote at some length in my argument memorandum, it was held that there is discrimination against a connecting barge line, when that line is not admitted to a joint rate structure along with railroads, and the report went considerably further than that. It said that discrimination cannot be cured unless the joint rate with barge lines is made on a differential basis so as to reflect the lower cost and lower value of the service for the barge line haul.

That, please, if I may emphasize it, was said as a requirement in curing discrimination, in violation of Section 3, and I quote the one sentence to illustrate the holding. Commissioner Eastman says, and having reasoned it out carefully:

> "It follows from this that in determining what is necessary in order that discrimination may be avoided, we may require the rail lines which form part of both routes to join in a lower rate over the rail-barge-rail route."

[fol. 100] Now, if you please, I come to my third and final factual difference in treatment as to rates, and that goes to the difference in treatment because we have rates, joint rates, from Port Sulphur, but when we add some barge carriers on the canal in the through routes there are no joint rates from Galveston and yet there is no such limitation in the case of all-rail rates. As to that I will content

myself with simply calling your attention to the Central Railroad of New Jersey case, which in an all rail situation involved a similar and principal set of facts in which the Commission held that that kind of difference of treatment is offensive to Section 3.

Now, if you please, I believe we have established as a matter of law that the differences in treatment shown by the evidence constitute forbidden discriminations, unless they are justified for some legitimate reason, and I have next addressed myself to that question:

My argument seems to run in 3's. There are three matters to be considered and which would seem to be controlling in determining whether these eastern railroads have just cause for this difference in treatment:

First, is their interest in the traffic—just getting the traffic and carrying it;

Second, is the matter of the relative service, depending on which may be the connection; and

Third, is the matter of relative compensation, dependant [fol. 101] on which may be the connection. That is, whether rail lines or barge lines.

As to the interest in the traffic, these eastern lines cannot be legimately concerned with who brings it to them. We appreciate that barge service is offensive to them generally, but when it comes to what they are going to haul, from East St. Louis to Danville, they have no legitimate interest to be served by insisting on a rate structure which confines that traffic to rail lines up to East St. Louis. They get the same traffic no matter who brings it to them.

Now, as to the service, there is no dispute on this record that the service is identical, whether it is brought to East St. Louis by the barge line or whether it is brought to East St. Louis by the Missouri Pacific Lines, from Galveston or New Gulf, Texas.

As to the compensation, the third possible ground for just cause, we contemplate that the railroads will receive out of the barge-rail rate, which you should establish in this case, precisely the same compensation as they receive out of the corresponding all-rail rate, so from the standpoint of compensation, relative compensation, they have no

cause to make effective these differences in treatments of which we complain.

Considering what would seem as a matter of common sense and logic to be the only categories of things, which [fol. 102] could possibly provide facts which would show a legitimate reason, or a just cause, there is nothing in this record—not a word—not a suggestion—from the standpoint of these eastern railroads, to justify what they are doing by way of this discrimination of their connecting lines.

It is possible that Division 3 thought that the depressed rate level afforded some justification, and I would like to take just a minute on that. I would like to have—we would like to have ten minutes for rebuttal if I can, so I am going to have to shorten my argument very sharply, but I would like to deal with this matter of depressed rate level because it is the only fact to which Division 3 makes reference and it didn't make reference in discussing the Section 3 (4) violation. It made reference to that only when discussing its duties under the National Transportation Policy.

I quote:

> "We do not believe, however, that this policy requires us to force rail carriers where they maintain a depressed rate to meet water competition to further depress their earnings on the traffic in order to favor that same form of competition."

Before I get to the significance of that from the standpoint of Section 3, I do want to point out that Division 3 apparently misapprehended the evidence in the case. It treats this rate to Danville as if depressed, in order to [fol. 103] meet water competition.

That is not the fact. There is no water competition to Danville; either from St. Louis or from Texas.

It is true that in 1936 the railroads established a reduced water competitive rate from East St. Louis to Joliet, to compete with Illinois River service. Later, and voluntarily, that rate was established to Danville, but there is no competitive situation at Danville which required them to do that.

Commr. Freas: Right on that point, the report of Division 3 on sheet 3 refers to a rate of $9.17, after adding the $1.50 from the point of extraction. Is that a correct rate?

Mr. Belnap: On sheet which?

Commr. Freas: On sheet 3, the second last paragraph.

Mr. Belnap: Of the report?

Commr. Freas: That is right. It is stated that the rate, "after adding $1.50, is $9.17."

Mr. Belnap: That is a commercial circumstance. It is a question of sulphur originates at New Gulf, Texas, and is $1.50 added to get to Galveston. There is $1.50 incurred before these barge lines touch this traffic in the selling price of sulphur. That is not a circumstance on which we rely. We think it is irrelevant to any question involving discrimination between connecting carriers.

Commr. Freas: Is not that $1.50 added to the $8.27 rate?

Mr. Belnap: It is borne by the traffic. Somebody pays it [fol. 104] some place. They don't pay it to the barge lines, sir. That is true, but we do not consider that circumstance as having any bearing at all on this question of equality of treatment in rates, fares and charges. That is $1.50 that is charged for the local move into Galveston for which these eastern lines are not responsible and we do not ask any relief from them on that account, as far as Section 3 is concerned.

As to this matter I quoted from the report of Division 3. I also want to say that there is no depression in earnings in fact below the all-rail earnings, if this barge-rail rate be established, because, as I have said, we contemplate giving them the same earnings, and when Division 3 used this phrase "further depress their earnings," it was plainly under some sort of a misapprehension, presumably it must have meant to depress their earnings by taking less than $2.95, the local rate, but that goes to the heart of the case under Section 3. No matter whether they have a reduced local rate or what they have, until they give these complainants equality of treatment, with their rail connections, they are squarely in violation of paragraph 4 of section 3, and we earnestly ask Your Honors to so find.

Thank you.

Chairman Johnson: Mr. Macleay.

ARGUMENT OF DONALD MACLEAY.

Mr. Macleay: May it please the Commission, my appear-
[fol. 105] ance is on behalf of Coyle Lines, and Dixie Carriers. They are the carriers that operate between Galveston and New Orleans, over the Gulf Intracoastal Waterway, the red-dotted line on the map visible before you.

For many years these carriers have participated in the through movement of sulphur from Galveston to all points on the inland rivers, Great Lakes, including East St. Louis, and on all joint rates, the differential, Galveston over Port Sulphur, is $1.01; the same $1.01 we ask here be added to the present joint rate from Port Sulphur in order to accord a joint rate arrangement to Galveston.

Mr. Rogers and Mr. Belnap have explained at some length the proposition that the existing rates and practices of the defendant rail carriers constitute discrimination against their water connections in favor of their rail connections.

The carriers for whom I speak are subject to an even more striking type of discrimination. The defendant railroads maintain joint rates with the barge line operating from Port Sulphur through East St. Louis but they refuse to enter into joint rates with the barge lines operating over the Galveston to East St. Louis route, and that is the only part of the route that my clients can participate in.

Commr. Mahaffie: How do you participate, interchange barges at New Orleans?

Mr. Macleay: Yes, sir; it is handled on one factor rates,
[fol. 106] joint rates.

It is our position that the statute flatly prohibts discrimination of this type, in words which permit of no equivocation, and for sound and valid reasons, the basic premise upon which the prohibition of such acts is predicated was stated by the Commission many years ago in the Chattanooga Packing 33 ICC 384 case where it said:

> "If carriers are permitted to apply higher rates for the same service on traffic routed over connecting water lines than on traffic via their all-rail connections, they will be in a position to destroy all water competition, and to deprive shippers of the advantage of their location upon navigable waters."

Your attention has been called to the Mecklin case, where the Supreme Court specifically considered and held illegal discriminations against connecting barge lines resulting from through rate structures of the railroads.

More recently, the same result was reached in the Blue Line case 100 Fed. Supp. 66.

As clear and concise a statement of the meaning and intent of the statutory prohibition against such discrimination as I have ever seen was contained in the dissenting opinion of Commissioner Johnson in the Coast Transportation Company case, Coast Transportation Company against the Aberdeen & Rockfish Railroad Co., 256 ICC 339, where he said:

[fol. 107] "The language of Section 3 (4) is definite and unequivocal. As amended September 18, 1940, it in fact, seems broader and even more definite than prior to that date. The section as previously in effect read 'all carriers shall afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines,' and by the recent amendment the phrase 'shall not discriminate in rates, fares and charges between such connecting lines' was changed to read, 'shall not discriminate in their rates, fares and charges between connecting lines.' The elimination of the word 'such' undoubtedly broadens the scope of the statute, if indeed it needed broadening, and it must not be overlooked that the term 'connecting line' is now definitely defined as the connecting line of any carrier subject to the provisions of this part, Part I, or any common carrier by water subject to Part III. It is true, as contended by the defendants, that proportional rates are but factors of through charges, but this fact is no warrant for using such a factor as a device for the destruction of competitive transportation agencies. If defendants are permitted to dictate the agency which shall handle their traffic beyond the interchange point, or shall dictate over what carrier that traffic shall reach the interchange point, either through the use of propor-
[fol. 108] tional rates or in any other manner, they have it within their power seriously to hamper, if not eliminate, such of their connecting lines as their fancy may prompt. It seems clear that Section 3 (4) was enacted to prevent just such a possibility."

Commr. Mahaffie: Is that a Commission case?

Mr. Macleay: That was a Division case.

Commr. Mahaffie: What happened to it later?

Mr. Macleay: It was reversed by the entire Commission 286 ICC 439, and the discrimination was ordered removed and we submit that same result should obtain here.

Thank you, sir.

ARGUMENT OF JOHN EISENHART.

Mr. Eisenhart: If it please the Commission, I am appearing on behalf of the American Waterways Corporation. Rather briefly, that is a national trade association of barge lines, operating throughout the United States generally, most of whom are in the area covered by the issues in this case.

I will speak but to one point, with only five minutes, since we wish to reserve the rest of the time for Mr. Belnap.

Under Section 307 (d) which is the public interest section, the first question to resolve is what is the public, in so far as this case is concerned. Obviously, it is the shipper or the receiver or both. Obviously, it is the railroads. Obviously it is the water lines.

[fol. 109] We will take the first group, and it is either the shipper or receiver that is important, depending upon who routes the traffic and has the benefit of the service. It may be both. Generally in sulphur it is the receiver.

Now, unless the barge line position is sustained here, obviously the Danville receiver will be unable to avail himself of barge line service, as a practical matter, in connection with any sulphur originating in the Texas area.

The same thing applies equally with the shipper. The shipper, at Galveston, would be absolutely eliminated as far as this service is concerned.

What about the railroads?

Mr. Belnap has covered that very fully. The barge lines are asking them to take no less than they now take from their connecting carriers. He outlined in great detail the fact that the railroads have no legitimate objection to receiving the same sulphur from the barge lines as it does from its connecting carriers at East St. Louis.

What about the barge lines?

As a practical matter, they are absolutely out. Mr. Macleay's lines, which operate from Galveston to New Orleans, are in a position where they cannot handle a pound of this traffic.

If you thus sustain the railroad position, you are in effect allocating traffic by a practical rate situation, and this [fol. 110] Commission has said many times that that is not their province, and it is being allocated by virtue of a violation of Section 3 (4).

The question of the differential comes into the picture from this standpoint:

This Commission has time after time recognized the disability of service, barge versus rail, and as time has gone on since 1940, when the Transportation Policy was enhanced, the Commission's decisions have more and more recognized their responsibility under the Transportation Policy, and have read it in connection with the substantive provisions of the Act, and given it the weight to which it is entitled.

The limitations on the barge lines are terrific. They have but eight or nine commodities that are available to them—very limited point of origin and discharge, and if you eliminate the points here, you have eliminated automatically at least two barge lines from any participation whatsoever, and you have eliminated a quantity of traffic moving here from the various other barge lines that participate from New Orleans northbound, and we feel—and I am speaking on behalf of the industry generally—that if there was ever a case where the Commission should act under Section 3 (4) and in turn under Section 307 (d), this is the case, for the reason that a limitation on a barge line is very terrific and this is one commodity that if any can be [fol. 111] called natural water-borne commodities, it probably heads the list. It is a commodity that has always moved by water. It originated by water, it moved coastwise originally by water. In fact, even the traffic coming up the Mississippi moved by water into New Orleans, and thence up the river, and therefore, I submit that under the National Transportation Policy, the Commission should find that it is in the public interest to establish the joint through rates here requested.

Thank you.

Chairman Johnson: Mr. Daily.

ARGUMENT OF JOHN A. DAILY.

Mr. Daily: My name is John A. Daily. I represent the defendants here.

In the beginning I would like to direct the attention of the Commission to the fact that this petition for reconsideration in effect abandons such things as the allegations of the unreasonableness of the rates. On page 4, or rather, on page 2, "For the purpose of this pleading the matters of the reasonableness of the rates, the selling policies of the vendors, etc., will not be discussed, and they are all immaterial here.

To some extent I have to *beer* from that.

I might also point out, on page 4, that, on line 4, while they say the existing rates and charges over the barge-rail routes from Galveston to Danville are excessive and un- [fol. 112] reasonable, in violation of Sections 1 (5) and 305 (a) of the Act, as I understand it, the only party having any duty under 305 (a) are the barge lines. They here allege that those rates are excessive and unreasonable. I suggest that they attend to their own knitting, with respect to that section of the Act.

Now, in this case——

Commr. Mitchell: I got the impression the only question involved here was the question of the division.

Mr. Daily: That is not right.

Commr. Mitchell: That the barge lines wanted the same divisions as you now give your connecting railroads, and that was the only question involved.

Mr. Daily: One of their points is they wish to bring divisions into that case which the Commission has consistently refused to do, and correctly so.

Now, it might be well to keep in mind, as we look at the board here——

First, we might say that there is no showing here that the all-rail rate, $9.18, from Galveston to Danville, is unreasonably low. We know it is depressed, and it is a barge competitive rate. Mr. Belnap said something about the rate being first established to Joliet, where the barge does

get in, but Danville takes the same rate under the intermediate clause, and that is how Danville came to—originally came to the $9.18 rate.

[fol. 113] Now in the same vein, there is no showing that the barge-rail combination rate of $8.27 is too high.

Between the present all-rail rate and the present barge-rail combination rate, they have a differential in their favor at present, of 91 cents per gross ton. Thus if the Commission did nothing here, they would still be 91 cents per ton under the all-rail rate.

Commr. Mahaffie: Is it correct they are now moving no traffic?

Mr. Daily: I don't know what the situation is at the present time. Is that what your question is directed to?

Commr. Mahaffie: I suppose you are confining yourself to the record, but were they moving any of this traffic at the time the record was made?

Mr. Daily: At the time the record was made, it is my understanding that the American Barge Line and the Federal Barge Ling were not moving this particular traffic. As far as any other *other* is concerned, I don't know. I may come to that later.

Commr. Alldredge: May I ask, the rates have been cited here in argument and in argument, that seemed to include the increases in Ex Parte 175, but looking at the exhibits of record, it seems that they don't include them. What is the situation?

Mr. Daily: I do not believe that the rates, as stated [fol. 114] in the record, include Ex Parte 175. I don't think so.

Commr. Alldredge: Take the all-rail rate from Galveston to Danville, of $9.184 per long ton. Doesn't that indicate that Ex Parte 175 increases have been added?

Well, you needn't spend any time on it.

Mr. Daily: I generally find that on the exhibits but I don't find it here. If the Commission so wishes we will advise them.

Commr. Alldredge: That is an odd cent there that doesn't usually occur in the regular rate.

Mr. Daily: I see that.

Now, this Commission recently denied a petition for reconsideration in Docket 30792, the Algonquin-Missouri

Chemical case. There was some mention made in the opinion of Division 3 in this case that to some extent the issues in both cases were alike. Certainly they had reason to do so in as much as Mr. Belnap already advised them that they were.

As we pointed out in our reply to the petition for reconsideration, on May 1, 1952, Mr. Belnap addressed a letter to this Commission stating that the issues involved in both of these cases were exactly the same, and that no purpose would be served in arguing the same principles over again.

Now, while as a lawyer I can appreciate the fact that they would like to back-track on that here, as an opposing lawyer I don't intend to let them.

[fol. 115]: In both cases the complaint is almost the same. If you change the names of the defendants and the names of the ports, it is.

Relief is sought under the same sections. The same relief is sought. As a matter of fact, in the Algonquin case, it might have been even a little stronger, because there a shipper was a co-complainant and no shipper at all testified in this case.

I might also mention in that respect that while that letter was written by Mr. Belnap, copies of it were sent to every party of record. So far as I can determine from my own file, none of the other co-plaintiffs took exception to that statement at any time.

Now, in computing these rates, in as much as they have made statements to the effect that they will be driven out of business and not move any of the traffic, it might be well to point out that in these cases, where the barge line asks the Commission to establish a through route, and prescribe a joint rate, that their part of the joint rate remains the same, or goes up. Their local rate is not impaired one bit. Their local rate at present from Port Sulphur to East St. Louis is $4.31. Adding the $1.01 arbitrary, Galveston to Port Sulphur, gives them a rate of $5.32.

Commr. Alldredge: Do you represent the lines beyond East St. Louis?

[fol. 116] Mr. Daily: That is correct, the defendants in this case.

Commr. Alldredge: What objection do they have of accepting the same revenue for hauling this traffic from East

St. Louis to Danville as to whether they get it from the Missouri Pacific or barge line?

Mr. Daily: Because on the traffic which we now have with the Missouri Pacific, that is an all-rail barge competitive rate. That is the reason why it went in, but we have a $2.95 local rate from East St. Louis to Danville, which we expect the others to use.

Commr. Alldredge: I would like to know why, speaking in behalf of those particular roads, why they want more money out of transporting this traffic from East St. Louis to Danville, if it is given to them by a barge line at East St. Louis, than if it is given to them by a railroad?

Mr. Daily: Because we at this time do not have a through route or a joint rate with the barge lines and we have a local rate over which we expect to move part of the traffic.

Commr. Alldredge: Would it not be the same to them if they got the same amount of revenue, no matter what carrier gave it to them?

Mr. Daily: We wouldn't get the same amount of revenue, Mr. Commissioner. We will get a reduction from $2.95 to $2.26 under their proposition, at the same time they are going higher.

Commr. Alldredge: That is on the ground that you are ac- [fol. 117] tually moving traffic by this barge-rail route, isn't it?

Mr. Daily: Yes, sir.

Commr. Alldredge: I thought you said that the record didn't indicate that.

Mr. Daily: The traffic, not from them; the traffic was not from them. I think the record indicates, and we may as well discuss this at this time, that there was a prior movement from Galveston by a contract carrier, and he used the $2.95 rail rate, local rate, but he moved it, as I understand, on a rate of $4.65, his all-water rate—not $5.32.

The difference in there came with a much lower barge rate than is proposed here and when we come to construct this rate, we find that while the barge local rate is $4.31 from Port Sulphur, the division, or the part given to Mr. Belnap, the American Barge Lines and the Federal Barge Lines, yet their proposed division out of the rate they want this Commission to establish is $4.40.

Mr. Belnap: From where?

Mr. Daily: From Port Sulphur to East St. Louis.

Mr. Belnap: That is already in effect, though.

Comm. Freas: I still am not clear on this rate situation. The barge-rail rate from Galveston is $8.27, is it not?

Mr. Daily: Just a moment: From Galveston to Danville.

Commr. Freas: To that you added $1.50 from the point of extraction, is that correct? It is not on the board, but that [fol. 118] is what the record shows.

Mr. Daily: I don't follow you there, sir.

Commr. Freas: The sulphur doesn't originate at Galveston.

Mr. Daily: Now I see what you are driving at. As Mr. Belnap explained and as far as this record shows, that $1.50 is a cost between the Texas men and the Galveston port.

Commr. Freas: What I am coming to is the competitive situation. The $9.27 and $1.50 makes $9.77 rather than $9.14. Now how can it be contended that a rail rate of $9.18 is competitive with a barge-rail rate of $9.77?

Mr. Daily: But the $1.50 you are speaking of is not part of the barge rate.

Commr. Freas: It is part of the charge for moving the sulphur, is it not?

Mr. Daily: The $1.50 is, let us say, due to the fact that instead of having the sulphur at the shore line it is inland some distance, but that is not part of the barge rate. It makes no difference to the barge lines or us, as Mr. Belnap explained, neither one of us gets paid that $1.50.

Commr. Freas: Does the $9.18 rate apply from the point of extraction of the sulphur?

Mr. Daily: Yes, that is correct. That is my understanding, direct from the mines in Southeastern Texas, in the Galveston group. In that connection I might point out that while you asked some time ago about the situation be- [fol. 119] tween Galveston and Port Sulphur, I assume there are like charges or something like that engaged in getting the sulphur to Port Sulphur, to the barge there, just the same as there would be to the barge at Galveston, but as far as I know, that is not a part of the case here today.

Commr. Alldredge: The shipper must absorb that difference.

Mr. Daily: It is my understanding that the Galveston shipper absorbs some of that. I think you may find something to that effect in the record, Mr. Commissioner, but at any rate, it enters into—it doesn't come to us or to the barge lines plaintiff here.

Commr. Alldredge: You say that is not a disadvantage to the water-rail route?

Mr. Daily: Not in the sense that we have before us today.

Commr. Alldredge: It is not an economic disadvantage?

Mr. Daily: An economic disadvantage but not as a question of a rate disadvantage.

Commr. Alldredge: Somebody has to absorb that $1.50.

Mr. Daily: It is my understanding that the shipper does.

Commr. Alldredge: He is willing to do that in order to ship?

Mr. Daily: That is my understanding.

Commr. Alldredge: Thank you.

Mr. Daily: I don't think that quite covers it. I think you will find something to that effect in the record. We [fol. 120] more or less dispense with that today since the point was not made in the petition for reconsideration.

In leaving this matter of building the rates, I think it should be kept in mind that where barge line rates, the barge line division that they want out of this proposed rate, is 9 cents higher than their local rate, 9 cents higher than it was at the time of the hearing, the difference between $4.31 and $4.40, so while we are coming down some 65 or 69 cents, they either stay even or go up.

Now, there is no through rate here today, as the Commission understands it, by barge-rail, Galveston to Danville. As I said before, the prior movement from Galveston was by a contract carrier. He was moving this at a barge rate of $4.65 plus the $2.95 local rail rate.

Commr. Alldredge: Was he exempt from regulation?

Mr. Daily: He paid the $2.95 local rail rate.

Commr. Alldredge: I know but he was hauling a bulk commodity, wasn't he?

Mr. Daily: That is approximately all there is in the record on that situation, Mr. Commissioner.

As far as this record is concerned, and to my own personal knowledge, there has never been any through movement

involving these carriers from Galveston to Danville. Now, in the petition for reconsideration, at page 21, are cited several cases. I will correct that. On page 7—where the [fol. 121] petitioner here talks about the through route being in existence, and he cites the Tomphson case, Thompson v. the United States, at 343 U.S. 549. In that case, the Supreme Court held that there was never any evidence of any through transportation services ever in effect over certain routes to Omaha. These routes were involved in that case. The fact that a physical connection existed meant nothing because a physical connection is pre-supposed, and the fact that each separate carrier had published his joint rates—I should say separate proportional—also meant nothing and the fact that there had been a through movement over a part of that route to points short of Omaha, the Supreme Court held meant nothing when determining whether a through route was in existence directly to Omaha.

Even in the Great Northern case, in the citation, the extracts made there by counsel, it says:

> "The through routes in question already exist since the carriers concerned have continuously provided through service over the same through routes,"

which is certainly not the point here, and without the through route we have no joint rate.

While I was not a part of that case, it is my understanding that in the Rail-Barge Rates, at 270 ICC-591, this Commission made an extensive study of the barge-rail structures, and determined in that case that they would not require joint rates on bulk commodities. I do not believe that today, [fol. 122] where we have a 64 page record in front of us, that the Commission should depart from that principle.

Now, on the question of public interest, as I say, no shipper appeared in this case. The evidence in that respect was second-hand. It was clearly hearsay and the Division regarded it as such.

Where a shipper is truly interested in my short experience before the Commission, I have never noticed any reluctance on their part to come forward and say so, where they wanted a rate structure put in.

As to the barge lines' contentions that they will be driven out of the business, I think we pointed out in our brief at page 12, and if I remember correctly this was a citation from a statement of the Commission, in another barge case, it said that rail originations of sulphur in Louisiana dropped from 112,000 tons in 1945 to 35,000 tons in 1949, while the barge lines went from 309,000 tons in 1945 to 359,000 tons in 1949.

I cannot, in view of those figures, take their allegations seriously on that point.

Now, as the Division had found, this rail rate is presently depressed to meet barge competition; not only the all-rail rate but the local rate of $2.95.

If you will look, as was pointed out by Witness Sweet, at Exhibit 4, for that distance of 181 miles, that rate of $2.95 [fol. 123] is extremely low. In connection therewith, I might point out the rate to Streator, Illinois, of 196 miles, is $4.93. That should certainly indicate that even the local rate is depressed.

Now, on the question of divisions, as this Commission has found throughout very many years, divisions are not a part of a case like this. You do not get to joint rates, fares and charges until you get to a through route, and you do not get to the question of divisions until you get to the question of joint rates, fares and charges, and here we have no through route; we have no joint rate; and the question of divisions is not material to this case. The cases holding that way are legion.

As to the Mecklin case cited by counsel, I think it should be recalled that that involved proportionals only, and that the through rate referred to there by the Supreme Court was a rate composed of a series of combinations. There was no single factor rate involved in that case at all.

Now, it should be clear, I think, that if the complainants' contentions were sustained here, that it would be impossible for the rail carriers, north and east of this point of interchange, to enter into a competitive barge rate in connection with their southern carriers.

If that all-rail line crosses the barge line at any interchange point between origin and destination, then should [fol. 124] their contentions be here sustained, there could

be no such thing as a barge competitive rate, because obviously the barge line will reach that interchange point at a lower rate than the southern railroads, or the southwestern railroads, and if they can take the eastern portion of the all-rail barge competitive rate, the barge competitive rate is not effective any longer. There is just no reason for it.

We pointed this fact out, in answering a motion for a subpoena duces tecum, to compel discovery of divisions in sulphur from Louisiana and Texas to Clinton, 280 ICC 789, and that motion was there denied.

I might say that with respect to that barge line competitive rate, I said it would be impossible unless the southern lines agreed to take all of the shrinkage in their part of the all-rail through rate, but if you do that, then you go against the section of the Act on divisions because you are designing divisions on something else without taking into effect the factors which the Act says shall be considered in the prescription of divisions.

Now, I have in the limited time available gone over some of the cases cited by Mr. Belnap. I think you will find that in most of them they were cases where the through routes and joint rates were already in existence. That is entirely different from the facts in this case. Furthermore, in those cases—in most of them, I would say—the Commission found [fol. 125] where they established the rail-barge joint rates, that they were necessary or desirable in the public interest, and the Division turned that portion down here. They found that they were not necessary, desirable, in the public interest.

As for the Galveston-Port Sulphur carriers, to my knowledge neither the Dixie nor Coyle entered evidence in this proceeding at all. As far as I know, no witness testified on their behalf.

Mr. Eisenhart, I do not know whether he was in the case before, but his remarks were more or less directed to the situation with Coyle and Dixie and the same situation applies. There is no evidence that they are not handling the traffic or that it is hurting them in any respect.

I think that concludes my statement.

Chairman Johnson: Mr. Belnap, are you going to close this argument?

Mr. Belnap: I would like to, sir.

REBUTTAL ARGUMENT OF NUEL D. BELNAP

Mr. Belnap: I would like to straighten out right at the beginning what issue we are discussing here and what relief we ask:

For the purpose of this reconsideration, the barge lines elected to stand on their rights under paragrah 4 of section 3 and that is what we have argued. It also involved an issue under section 15 (3) as to the rates and routes being in the public interest, Mr. Eisenhart is interested in that, [fol. 126] and the barge lines generally, but we have felt we had a square point of law in this case, and we want a reasoned opinion from the Commission upon it, and that is why we confined our argument as well as our petition for reconsideration to that question.

We are not asking the Commission to fix divisions. We are asking you to say, by order, that we must have a $7.67 rate, joint rate, with eastern lines, in order to cure the discrimination.

Commr. Alldredge: May I call your attention to a statement of your witness in the record?

Mr. Belnap: Yes, sir.

Commr. Alldredge: I think it explains how you propose to cure it, and it does bring in this so-called $1.50 we have been talking about.

It appears at page 18 of the transcript, and Mr. Hartman, your witness, says:

> "If a barge-rail rate is established from Galveston, Texas, to Danville, Illinois, on the usual basis of $1.01 cents per gross ton over the rate from Port Sulphur, Louisiana, such bar-e-rail rate would be $7.67 per gross ton. Adding the $1.50 price differential would make the charges via the barge-rail route from Galveston to Danville, $9.17 per gross ton. This rate is to be compared with the presently effective all-rail rate of $9.184 [fol. 127] from Galveston, Texas, to Danville."

Were you trying to equalize the economic advantages?

Mr. Belnap: No, sir.

Commr. Alldredge: Why did you work it back to almost the exact cent?

Mr. Belnap: All we want to do, all we can ask to do in this case is to put in a rate as far as the barge lines are concerned, one is a $1.00 and one is over Port Sulphur. We have canal lines who have to have a cut off this rate, if we give the eastern lines what we believe to be their all-rail division, that is $2.26; we believe it to be the all-rail division because that is the division they take out of the barge-rail rate from Port Sulphur and we don't believe they are taking any less favorable divisions from barge lines than they are taking from rail lines.

If we give them the same division, we can put in that $1.01 over the Port Sulphur rate, it will, in view of that $1.50, which Mr. Freas has asked about, also make an equal rate with the all-rail rate.

Now, as a matter of commercial handling between shippers, at the time this case was tried, the people who sold sulphur from New Gulf, absorbed out of their price that $1.01 rate.

We have argued Section 3—that $1.01 difference, rather —we have argued a question of discrimination, we have laid that $1.50 entirely aside, because we believe it to be irrelevant to any question of difference in treatment as [fol. 128] between connecting carriers.

Commr. Alldredge: You laid it aside after your witness brought in the record, didn't you?

Mr. Belnap: We tried our case, sir.

No, we have not laid it aside up to the time of this petition for reconsideration. We tried our case, as far as the public interest, and the reason throughout we took all of those into consideration, presented them to the Commission, and they were considered by the Examiner.

Commr. Alldredge: What is the real basis for your proposed $7.67 per ton barge-rail rate?

Mr. Belnap: It is $1.01 over the joint rate they maintain with us from Port Sulphur.

Commr. Alldredge: Why did you use $1.01 over the sulphur rate?

Mr. Belnap: That is the prevailing difference as between

Galveston and Port Sulphur on all rates on sulphur. It is the established list for California. We have Mr. Macleay's lines to take care of by way of a division. They won't come in for nothing and there has got to be $1.01 more in the rate because of that canal haul.

Commr. Alldredge: So it was just an incident that it equalized the rate from the initial point of origin?

Mr. Belnap: That is true. That $1.01 has its place in any [fol. 129] rate case or that $1.50 has its place, that cost from New Gulf to Galveston, any place where you are considering the comparison of the whole charge on both sides of the picture, for the purpose of coming to some competitive relation, but here we are only talking about discrimination as between connecting carriers.

Commr. Alldredge: Well, now, do you propose to limit the application of $7.67 to 500 ton——

Mr. Belnap: Whatever the prevailing minimum is.

Commr. Alldredge: 500 tons is the connection.

Mr. Belnap: I think that is so.

Commr. Alldredge: Not per car.

Mr. Belnap: Sulphur you have to barge. You can't distinguish a car. You have a whole load and you take it on the tons that goes in the car.

Commr. All-redge: You are proposing a 500 ton limit, or minimum.

Mr. Belnap: Yes, that is what we have. We have many rates with these rail lines, not only on sulphur but on salt, ores, steel, in which there is a minimum for the barge portion of the haul, which is 200, 500, 1,000 tons, and then at the point of interchange, the carload minimum applies. That is a recognized part of barge rail rate structures on these commodities which can move and do move in barge loads. We have them all through our rate structure.

[fol. 130] Commr. Alldredge: Are you asking for establishment of joint through rates or simply the removal of discrimination, either that way, or through the establishment of proportional rail rates?

Mr. Belnap: No, we are asking for joint through rates, and urge you that that is the necessary step to remove the discrimination demonstrated.

Commr. Alldredge: If the Commission required the rail-

roads to establish beyond East St. Louis a proportional rate——

Mr. Belnap: Equivalent to their division, that would be one method of curing the thing about which we complain but that isn't the relief we have asked. I don't believe that is really one of the issues of our complaint because our complaint asks for through, joint through rates to cure the discrimination.

Now, on this point——

Commr. Alldredge: You haven't got any general prayer for relief?

Mr. Belnap: Yes, we have such other relief as may seem proper, but now Mr. Daly, I don't know what his point is, but he says there is no through route in existence. If he is right let me point out that then you simply have a case of route and rate discrimination as well, and when he said that these cases I cited to you, under Section 3 (4), there were already through routes and joint rates in effect, he is [fol. 131] badly mistaken except that Ann Arbor case in which there was an existing through route, but all those Section 3 (4) cases, other than the Ann Arbor case, involved a requirement that through routes and joint rates be established in order to cure discrimination, every one of them, and I sent my argument memorandum last week—Mr. Daly didn't get it until Monday—I sent it to Mr. Daly so he would know the cases on which I was going to rely but he is completely mistaken in telling you what was involved in those cases. As I said, if there is no through route, as he claims, then you simply have the ordinary case of through route as well as joint rate discrimination, the same thing that was before the Commission in the United States—War Department case, in 92 I.C.C. from which I have quoted at considerable length, because there the Commission said, as to the route and as to the rate, you have got to join these barge lines and you have got to make the rate on a differential basis and you have got to do that to comply with paragraph 4 of section 3. That was the entire basis for the decision.

Commr. Alldredge: All right. Under those precedents what the Commission really looks at in the final analysis is the differential between the barge-rail route and the all-rail route from Galveston, doesn't it?

Mr. Belnap: Yes. You have to say that such and such a differential rate is required to cure the discrimination.

Commr. Alldredge: What is your differential that you arrive at under your proposal?

[fol. 132]

Mr. Belnap: It is on my Memorandum A, it is $1.51. It is $1.514.

Commr. Alldredge. Per gross ton?

Mr. Belnap: Per gross ton. You see that would be, Mr. Commissioner Alldredge, that would be in relation to the differential in the port to port rate from Port Sulphur, or from Galveston, exactly the same as the Danville differential is in relation to the port to port differential at East St. Louis, when from Port Sulphur.

I call your attention, if you will look at line 4, column 2, 442, line 6, column 4, 252, that is our differential, first at East St. Louis, then at Danville, from Port Sulphur. The Danville differential is $1.90 less than the East St. Louis differential, because we have these rail services beyond and the spread in rail rates as now.

Now, if you will look at line 4, column 3, it is a 341 differential, port to port at East St. Louis from Galveston. We may have had $1.51 at Danville, we will have $1.90 lesser differential, which makes us completely consistent with the Port Sulphur adjustment in which these railroads now voluntarily participate.

I would like to say a word about the Algonquin case which was decided by Division 3 and in which the entire Commission denied a petition for reconsideration.

[fol. 133]

Looking backwards, I think we very definitely made a mistake in not pressing upon the Commission the same questions under Section 3 (4) in that case as we did here. That case had the same issues. It involved a question under Section 3 (4); Division 3 decided against the barge lines primarily on the ground that in the general public interest, or that there had been no demonstration of public interest to show sulphur ought to move by barge-rail and by all-rail particularly as it might affect the New Orleans lower cost which is the only line serving Port Sulphur, Louisiana.

We in our petition for reconsideration undertook to meet Division 3 head-on, on that proposition, and urge you that the Division had made a mistake in the circumstance on

which it relied in finding there was no public interest, while the issue was under Section 3 (4), unfortunately, we didn't press it in that case, but we are pressing it in this case, we are relying on it 100 per cent in this case.

Commr. Mahaffie: What is the reference to that Algonquin case?

Mr. Belnap: 30792. I don't know the volume and the page.

Mr. Knudson: You say you rely, Mr. Belnap, exclusively on Section 3 (4). Do you mean that the other considerations, some of which were set forth at least in the dissent in the primary case, should be brushed aside now?

[fol. 134] Mr. Belnap: No, sir.

Let me say it this way: From the standpoint of the barge lines, we wanted very much to have a completely reasoned opinion from the Commission on this interpretation of Section 3 (4), particularly as applied to a situation of this kind. We thought we could achieve that best by confining our petition and our argument to that point.

Now, Mr. Eisenhart has argued that general public interest. The barge lines have not abandoned any part of our complaint. We simply insist that regardless of what might be the finding as to reasons, or as to whether there was adequate proof of public interest, there is a definite interest, clear case, as a violation of Section 3 (4), as a matter of both fact and law, and we urge a decision of the Commission on that point.

But there is no abandonment in the sense we dismiss or anything like that.

As far as 26712, the General Barge-Rail case, where the Commission as a matter of reasonableness held it would not prescribe any rates on bulk commodities, I call your attention to two things:

In the first place, in that case, the barge lines did not propose any joint rates on commodities moving subject to barge load minimum. That case was entirely a carload and l. c. l. quantity case, from the standpoint of the barge-rail rates which were discussed before the Commission.

[fol. 135] Secondly, the reason given in the Commission for not fixing some joint rates on commodities moving in bargeload quantities, was that most interior points couldn't receive it.

Of course, that fact is not true here. Danville is in a position to receive the sulphur in the lots that would apply under these rates, and the only reason mentioned in 26712, on the question of reasonableness, does not apply to the instant case.

Now, I listened in vain for Mr. Daly to tell us some legitimate reason from the standpoint of his railroad, the New York Central, for failing to treat his barge line connections like he does the Missouri Pacific. He talks about the rail originations dropping. That is of no concern to the New York Central Railroad, unless they want to combine with their southwestern connections to try to put the barge lines out of business. The only time it becomes of interest to Mr. Daly's railroad, as to what happens to the Missouri Pacific, is when he wants to run the barge line entirely out of business.

In so far as his legitimate selfish interests are concerned, the New York Central Railroad, if he gets this traffic via barge, he gains just as much, his whole railroad is just as well off, as if he got it from the southwestern connections, and that is true whether his rate is depressed or not. If he elects to join in the Missouri Pacific, on a rate less [fol. 136] than a normal rate, and out of that rate take a division less than his local rate, he hasn't got a leg to stand on, when he comes here and tries to justify that difference in treatment as not being a violation of Section 3 (4) and I call your attention that on the question of law, which we tried to discuss with you, he didn't cite a single case, he didn't give you a single reason opposed to those which we have presented in support of our case in chief.

Thank you.

Chairman Johnson: The case will be taken under advisement.

The Commission will adjourn.

(Thereupon, at 11:32 o'clock a. m., the above matter was submitted, and the Commission adjourned.)

[fol. 137] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—October 10, 1955

Appeal from the United States District Court for the Southern District of Texas

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

October 10, 1955.

(5357-9)

The Questions Presented Are Substantial

On the first question, the application of the non-discriminatory requirement of Section 3(4) to the charging by a railroad of a local rate on traffic received from a water carrier connection which is higher than the division which it accepts as compensation for its identical services on traffic received from a rail connection; the Commission attempted to distinguish this case from the principles which it had enunciated with reference to discrimination as between *rail* connecting carriers, and from those enunciated by the Supreme Court with reference to discrimination as between rail and water carriers, in words which clearly illustrate the basis for its ultimate conclusion:

> "The claim here is, not that the complainants are discriminated against in the matter of divisions of joint rates, as was the case in *Western Pacific R.Co.* v. *Southern Pac. Co.*, 55 I.C.C. 71, referred to by the complainants, nor that the separately established rate paid by the shipper as one of the components of a combination rate is greater for the transportation of ex-barge traffic than for ex-rail traffic, which was the situation in *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, also cited by the complainants, but that the separately established rate paid by the shipper on ex-barge traffic beyond East St. Louis is greater than the unpublished division of a joint through all-rail rate received by the rail carriers for the transportation beyond East St. Louis on ex-rail traffic moving from the same origin to the same destination. The comparison is between a rate or charge paid by a shipper and a division of a joint rate received by rail carriers, and is of unlike things. Basically divisions of joint rates are the result of contractual arrangements be-

tween carriers; they are not 'rates' or 'charges' as those terms are used in section 3(4) of the act. A seemingly contrary opinion expressed in *Western Pacific R. Co.* v. *Southern Pac. Co., supra*, upon which the complainants rely, was made, as above indicated, under circumstances different from those now before us, and is not controlling here."

In effect, the Commission there says that by the device of an arrangement for divisions of a joint rate with favored connections, while refusing to accord similar arrangements to other and less favored connections, carriers can put themselves beyond the reach of the provisions of Section 3(4). The Commission and the District Court, have failed to recognize that in the *Mechling* case the Supreme Court in addition to the question of discrimination by means of differing proportional rates, had before it also the matter of discrimination by means of divisions, and condemned both.

In that case the Commission (in *Grain Proportionals, Ex-Barge to Official Territory,* 262 I.C.C. 7), had approved, as to grain reshipped from Chicago which originated west of the Mississippi River, higher proportional rates to eastern destinations when the grain arrived at Chicago by barge than when the grain arrived at Chicago by rail. The Commission also had approved those same proportional rates on ex-barge grain originating at points in Illinois from which the railroads maintained joint rates out of which the eastern railroads accepted divisions lower than the said proportionals on ex-barge grain from the same origins. The Supreme Court sustained the decree of the District Court which set aside that approval by the Com-

mission. The decree so affirmed enjoined the Commission's order insofar as that order

> "Prescribes, approves, authorizes, or countenances *in any manner whatever* a charge for railroad services in transporting east from Chicago grain that has arrived there by barge that is higher than any rate or charge that is contemporaneously exacted *in any form or under any guise* for railroad services which do not appear from legally relevant findings of the Commission supported by evidence to be substantially different from railroad services in transporting east from Chicago like ex-rail grain from like origins west of Chicago." (Italics supplied.)

In its brief in the Supreme Court in that case, the Commission took the position that the proportional rates on ex-rail grain from origins west of the Mississippi River had the same status as the divisions of the eastern lines out of the joint all-rail rates from Illinois origins. At pages 40-41 of its brief the Commission said:

> "Consequently there is no distinction to be made in fact between the charges for transportation from Chicago to the East accruing to the eastern carrier whether they be obtained in the form of a separately established proportional rate or as a division of the joint through rate."

On that premise the Commission contended that the lack of equality with charges on ex-barge grain from Chicago to the East was not in violation of Section 3(4) because both the proportional rates and the divisions in the case of ex-rail grain were simply parts of through rates and the lawfulness of the relationship should be tested only from the through rate standpoint.

Office - Supreme Court, U. S.
FILED
JUL
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 233

DIXIE CARRIERS, INC., COYLE LINES INCORPORATED, AMERICAN BARGE LINE COMPANY, FEDERAL BARGE LINES, INC., *Appellants*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL., *Appellees*

Appeal from the United States District Court for the Southern District of Texas, Houston Division

STATEMENT AS TO JURISDICTION

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

At page 42 in its brief in the Supreme Court in the *Mechling* case the Commission said:

> "A division of a joint rate is not a proper standard by which to test the lawfulness of separately established rates."

In its decision in the *Mechling* case, the Supreme Court did not find it necessary to pass in specific terms upon that contention. However, the facts in the case before it, the breadth of the decree affirmed, and the obvious intent of its opinion make plain that it considered a difference between a division on all-rail grain and a higher proportional on ex-barge grain to be embraced by and offensive to the prohibition against discrimination in Section 3(4) to the same extent as when the difference is between two separately established proportional rates.

In striking down the order of the Commission, the Supreme Court said, at page 577 of its opinion in the *Mechling* case:

> "The basic error of the Commission here is that it seemed to act on the assumption that the congressional prohibitions of railroad rate discriminations against water carriers were not applicable to such discriminations *if accomplished by through rates.* But this assumption would permit the destruction or curtailment of the advantages to shippers of cheap barge transportation whenever the transported goods were carried beyond the end of the barge line. This case proves that. * * *"
> (Italics supplied.)

Appellees may contend that the precise question involved in the instant case was not decided by the Supreme Court in the *Mechling* case inasmuch as the Court did not specifically discuss by name the lower

divisions of all-rail rates from Illinois origins in relation to the higher proportional rate on ex-barge grain. If that were true, it would become all the more important to have the question now settled by the Supreme Court.

In the first place, the decisions of the Commission and the District Court are plainly contrary to the spirit of the *Mechling* case, and turn on a matter of form which disregards the substance. The Commission should have the guidance of the Supreme Court so that in this and other cases involving water carriers it will take jurisdiction when the substance demands.

In the second place, if the opinion of the District Court were to settle the law, the way would be open for railroads to evade, without fear of Commission or Court restraint, not only the spirit but the letter of the rule of the *Mechling* case. To accomplish the latter, it would be necessary only for the railroads to establish joint through rates, in lieu of proportionals, for all-rail movements out of which the eastern rail lines would accept as divisions amounts less than the rates charged when the grain transported by them is received from their barge line connections.

On the *second* question, as to the right and duty of the Commission to take jurisdiction and provide redress under Section 3(4) when a carrier participates with one connecting carrier in through routes and joint rates and refuses similar participation to another connecting carrier under similar circumstances, the Commission and another District Court recently reached a conclusion directly contrary to its decision, and that of the District Court in the instant case. In *Denver and R. G. W. R. Co.* v. *Union Pacific R. Co.*, 287 I.C.C. 611, 658, 659, 660, after finding no important dissimilarity

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between the transportation conditions in connection with the favored connection as compared with the connection excluded from through routes and joint rates, the Commission, at page 660, concluded:

> "That the maintenance by the Union Pacific and other defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3(4) of the act."

The only apparent distinction between that situation and this, is that there two railroads were involved, while here the carriers discriminated against are barge lines. There was no finding of reasonableness or public interest as to the rates covered by the foregoing finding. The jurisdiction taken and the order entered were bottomed solely on Section 3(4), which specifically permits no distinction between rail and water connections. Upon judicial review, the District Court for the District of Nebraska, Omaha Division[1] sustained the quoted finding and the order based thereon, and said:

> "The Commission found there was no important dissimilarity between the transportation condi-

[1] In *Union Pacific Railroad Company, et al.* v. *United States, et al.* (not yet reported, opinion filed October 22, 1954). That case, involving other and much broader issues, now is pending before the Supreme Court on the Appellate Docket, in Nos. 117, 118, and 119. It does not embrace the questions, involved here, of differing treatment of rail and water connections, nor of whether the provisions of Section 3(4) reach a discrimination resulting from acceptance of a lower division on the traffic of one connection while demanding a higher published rate on the traffic of another, under the conditions of this case.

tions in connection with the Bamberger and those in connection with the Rio Grande. Upon this record that factual conclusion may not be disturbed. Section 3(4) clearly prohibits such discrimination."

In the instant case, the District Court erroneously refused to construe Section 3(4) with respect to the jurisdiction and duty of the Commission as did the District Court for the District of Nebraska in the case just cited. If Section 3(4) prohibited a difference of treatment of connecting rail carriers in that case, the law can be no different when carriers by water seek the protection of the same statutory provision.

The District Court in the instant case erroneously failed to recognize that the broad powers of the Commission to determine what through routes and joint rates would be reasonable, and the limitation on those powers, as set forth in Section 15 of the Interstate Commerce Act (49 U.S.C., section 15), have no pertinency and are not controlling when there is a clear showing of discrimination between connecting carriers specifically forbidden by Section 3(4).

If the decree of the District Court in the instant case is permitted to stand it will, in effect, deprive water carriers of the protection of Section 3(4) as to discrimination in charges and differences in treatment as to through route and joint rate arrangements, and will vitiate the requirements of the National Transportation Policy for impartial regulation and equality of treatment of competing modes of transportation.

The third and fourth questions presented are necessarily involved in the first and second questions above discussed.

IN THE

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DIXIE CARRIERS, INC., COYLE LINES INCORPORATED, AMERICAN BARGE LINE COMPANY, FEDERAL BARGE LINES, INC., *Appellants*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL., *Appellees*

Appeal from the United States District Court for the Southern District of Texas, Houston Division

---

STATEMENT AS TO JURISDICTION

In compliance with Rules 13 and 15 of the Supreme Court of the United States, as revised, Dixie Carriers, Inc., Coyle Lines Incorporated, American Barge Line Company, and Federal Barge Lines, Inc., appellants, submit their statement to show that the Supreme Court has jurisdiction of this appeal and that substantial questions are presented.

It is submitted that the decision of the District Court failed to recognize and enforce the plain requirements of the Interstate Commerce Act as construed by the Supreme Court and for that reason the judgment should be reversed and the Commission's order should be enjoined and set aside. We believe the questions presented by this appeal are substantial and of public importance.

Respectfully submitted,

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OPINION BELOW

The opinion of the United States District Court for the Southern District of Texas, Houston Division, is reported at 129 F. Supp. 28, and is appended hereto as Appendix A. The opinion of the Interstate Commerce Commission, on reconsideration, including the dissenting opinion of the minority of the Commission, is reported at 291 I.C.C. 422, and is appended hereto as Appendix B.

The District Court entered no findings of fact or conclusions of law apart from its opinion.

JURISDICTION

This suit was brought by appellants under Title 28 U.S.C., Section 1336 to set aside an order of the Interstate Commerce Commission, and trial was held before a three-judge court convened under Sections 2284 and 2325 of Title 28, U.S.C.

The judgment of the District Court, dismissing the complaint, was entered on February 16, 1955. Appellants' Motion for New Trial was denied by order of the District Court entered on March 28, 1955, and Notice of Appeal was filed in that Court on May 17, 1955.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, U.S.C., Sections 1253 and 2101(b), and that jurisdiction of the Supreme Court is sustained by a large number of cases, including the following:

Interstate Commerce Commission v. *Mechling*, 330 U.S. 567;
Eastern-Central Association v. *United States*, 321 U.S. 194;
United States v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499;
United States v. *Baltimore and Ohio R. Co.*, 333 U.S. 169

Proof of Service

In compliance with the applicable provisions of the Revised Rules of the Supreme Court of the United States, I, Donald Macleay, one of the attorneys for the several appellants on whose behalf the foregoing Statement as to Jurisdiction is submitted, and a Member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing document on counsel for the several parties to this proceeding, as follows:

1. On the United States of America by mailing copies in duly addressed envelopes with first class postage prepaid to:

Honorable Simon E. Sobeloff
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

Honorable Stanley N. Barnes
Assistant Attorney General
Department of Justice
Washington 25, D. C.

James E. Kilday, Esquire,
Albert Parker, Esquire,
Maurice A. Fitzgerald, Esquire,
Special Assistants to the Attorney General
Department of Justice
Washington 25, D. C.

and with air-mail postage prepaid to:

Malcolm R. Wilkey, Esquire
United States Attorney for the Southern
District of Texas
Room 205, Post Office Building
Houston, Texas.

QUESTIONS PRESENTED

The questions presented involve a matter of statutory construction which arises out of the decision of the Interstate Commerce Commission of January 19, 1954 (291 I.C.C. 422), affirming a prior decision by Division 3 of the Commission of December 22, 1952 (287 I.C.C. 403). That decision denied the relief sought by appellants, who are regulated common carriers by water, in their complaint against Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad Company, The New York Central Railroad Company, and Wabash Railroad Company, all of which are common carriers by railroad operating (so far as concerns the issues of this case) between East St. Louis, Illinois, and Danville, Illinois, and with which appellants connect at East St. Louis.

The matter complained of is the charging by said railroads of their East St. Louis-Danville local rail rate on ex-barge sulphur originating at Galveston, Texas, and delivered to them by their water carrier connections at East St. Louis, while contemporaneously joining with connecting railroads at East St. Louis in a joint through rate from Galveston and nearby producing points out of which said railroads accept a secret, contractual division less than said local rate. The services rendered by the said railroads from East St. Louis to Danville on the ex-barge sulphur are the same as on the through all-rail sulphur. The Commission held, as a matter of statutory construction, that the circumstances stated did not constitute discrimination between connecting carriers within the meaning of section 3(4) of the Interstate Commerce Act. [49 U.S.C. section 3(4)].

2. On the Interstate Commerce Commission by mailing copies in duly addressed envelopes with first-class postage prepaid to

Samuel R. Howell, Esquire
Acting General Counsel
Interstate Commerce Commission
Washington 25, D. C.

Leo H. Pou, Esquire
Assistant General Counsel
Interstate Commerce Commission
Washington 25, D. C.

3. On the New York Central Railroad Company, Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad Company, and Wabash Railroad Company, by mailing copies in duly addressed envelopes with air-mail postage prepaid to

John A. Daily, Esquire
1225 La Salle Street Station
Chicago 5, Illinois

Palmer C. Hutcheson, Jr., Esquire
Room 1720 Niels Esperson Building
Houston, Texas

This, the ..... day of July, 1955.

DONALD MACLEAY

The dismissal of the complaint turned only on a question of statutory construction, the essential facts not being in dispute.

The questions presented by the appeal are:

1. Whether a division of a joint through rate is a "rate" or "charge" within the meaning of those terms as used in Section 3(4) of the Interstate Commerce Act [49 U.S.C. 3(4)].

2. Whether Section 3(4) makes unlawful the action of a carrier by railroad in participating with one connecting carrier in through routes and joint rates, while refusing similar participation to another connecting carrier seeking to engage in the same through transportation, where the said rail carrier performs the same service in each instance.

3. Whether the circumstances relied upon by the Commission as warranting the difference in treatment between appellants and the rail connections of the defendant railroads were legally sufficient for the purpose.

4. Whether the conclusion of the Commission is supported by adequate findings and substantial evidence.

STATUTES INVOLVED

The statutory provision primarily involved is Section 3(4) of the Interstate Commerce Act [49 U.S.C. 3(4)], as follows:

"(4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the re-

ceiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

The National Transportation Policy [49 U.S.C., preceding 1, 301, 901, and 1001], which by its terms permeates the entire Interstate Commerce Act and governs the administration and enforcement of all of its provisions, is as follows:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

STATEMENT OF THE CASE

Appellants are common carriers by water subject to Part III of the Interstate Commerce Act. By means of through routes and joint rates among themselves they engage in the transportation of sulphur from Galveston, Texas, to East St. Louis, Illinois. At East St. Louis appellants connect with the four railroads named above, and which were defendants in the proceeding before the Commission. Said railroads operate rail routes from East St. Louis to Danville, Illinois, to which latter point sulphur is shipped from the Galveston, Texas, area. As to sulphur moved by barge to East St. Louis and then by rail to Danville, said railroads refuse to join appellants in through routes and joint rates and demand their full local rate.

The East St. Louis—Danville railroads join with southwestern railroads in through routes and joint rates on sulphur from Galveston and producing points in that area via East St. Louis to Danville. Their refusal to join appellants in through routes and joint rates and to afford to appellants treatment as favorable as that accorded to their southwestern rail connections was made the subject of a complaint which the apellants filed with the Commission on December 13, 1950.

By that complaint the appellants alleged that such refusal was unjust and unreasonable in violation of Sections 1 and 307(d) of the Interstate Commerce Act [49 U.S.C., sections 1 and 907(d)], and that the establishment of barge-rail through routes and joint rates on sulphur is necessary and desirable in the public interest. This phase of the complaint is mentioned only in the interest of completeness of statement, since it was not involved in the proceeding before the District Court and is not involved in this appeal. Ap-

pellants also alleged, *as a separate and distinct matter,* that the refusal of the East St. Louis—Danville railroads to join with them in such through routes and joint rates, while contemporaneously joining in such arrangements with rail connections, as described above, constituted a discrimination between connecting carriers in violation of Section 3(4) of the Interstate Commerce Act [49 U.S.C., section 3(4)].

At the hearing held on the complaint, the evidence showed that the defendant railroads assessed their full local rate for the services rendered in completing the haul to Danville in the case of sulphur received from their water carrier connections. The evidence also showed that for their services rendered under all-rail joint rates the defendant railroads accepted as compensation a division less than their said local rate, although there was no difference shown between the services rendered by them on ex-barge traffic and those rendered by them on all-rail traffic. The exact amount of said division is not known since that is a matter of private contract between the East St. Louis—Danville railroads and their southwestern connections.

The Hearing Examiner issued a proposed report in which he found that the circumstances described constituted a discrimination against appellants in violation of Section 3(4). The Commission, Division 3, in a report dated December 22, 1952, 287 I.C.C. 403, dismissed the complaint. That opinion was directed almost entirely to the question of the reasonableness of the through route and joint rate proposed by appellants, and to the failure of the appellants to adduce shipper evidence in support of such through route and joint rates. Division 3 did not deal with the issue

of discrimination under Section 3(4) except to enter the following general findings without stating or explaining the basis therefor:

> ". . . The record before us affords no basis for finding of unlawful discrimination under section 3(4) of the Act. * * * We find . . . that the allegation under section 3(4) of the Act has not been sustained. The complaint will be dismissed."

Appellants thereupon asked for reconsideration and oral argument before the entire Commission, which was granted. Upon such reconsideration, appellants limited their presentation to the separate issue under Section 3(4). The report of the entire Commission on reconsideration is dated January 19, 1954, 291 I.C.C. 422, and is reproduced as Appendix B hereto. In that report the Commission did give separate consideration, *but only as a question of law*, to the issue involving discrimination in charges as between connecting carriers, alleged to be in violation of Section 3(4). It held against the appellants on the sole ground that "divisions of joint rates are the result of contractual arrangements between carriers; they are not 'rates' or 'charges' as those terms are used in section 3(4) of the Act." (291 I.C.C. at page 424). Upon that construction of the statute, and not upon a finding that the difference in treatment of barge and rail connections was non-discriminatory as a fact, the Commission dismissed the complaint.

In their complaint in the District Court appellants sought judicial review only as to the correctness of the Commission's construction of Section 3(4) of the Act. It asked the Court to hold that the Commission had misconstrued the statute and to remand the case to the Commission with directions to proceed to a de-

cision upon a correct construction of the statute. The United States filed an answer in which it neither admitted nor denied the essential allegations of the complaint. The case in the District Court was defended by the Commission and by the rail carriers who were the defendants in the Commission proceeding.

The opinion of the District Court neither discussed nor passed upon the narrow question of statutory construction as to which the appellants allege the Commission committed error. Instead, it dealt almost exclusively with questions of fact as to reasonableness and public interest, questions as to which appellants did not assert error within the scope of judicial review. On the question of discrimination, the opinion of the District Court said:

> ". . . we think Plaintiffs have not shown their claim of discrimination to be meritorious * * *. "* * * Neither have Plaintiffs shown that the existing rates discriminate against them."

The findings and conclusions of the District Court do not even touch upon the question of whether a division of a joint rate is a "rate" or a "charge" within the meaning of Section 3(4) under the circumstances of this case, much less dispose of the question.

In an effort to obtain an opinion or conclusions of law from the District Court which would deal directly with that question, applicants presented to the District Court a motion for a new trial and to amend findings of fact and conclusions of law.

That motion was denied and this appeal was taken.

(a) Plaintiffs here, who were the complainants in the proceeding before the Commission, are common carriers by water, operating under certificates of public convenience and necessity, issued by the Commission. The American Barge Line Company and the Inland Waterways Corporation, operating Federal Barge Lines, render common carrier barge service on the Mississippi River between (among others) Port Sulphur (near New Orleans, Louisiana) and New Orleans, Louisiana on the one hand, and East St. Louis, Illinois, on the other hand, a distance of approximately 1,049 miles. The Coyle Lines, Incorporated, and Dixie Carriers, Inc., render common carrier barge service from Galveston, Texas, to New Orleans, Louisiana, a distance of approximately 357 miles. Each of the Intervening Defendants operate rail lines from East St. Louis, Illinois, to Danville, Illinois, a distance of approximately 184 miles. The Intervening Plaintiff, the American Waterways Operators, Inc., is here because of its interest in the legal questions involved.

(b) The volume of sulphur movement from the mines in Texas to Danville, Illinois, is approximately 20,000 tons a year. During the last six months of 1950, the preponderance of the sulphur traffic from Galveston to Danville moved by rail to Galveston, by barge to East St. Louis, and by rail beyond. That movement, however, was by a contract water carrier which has since discontinued operation. Thereafter the sulphur moved from the mines, not through Galveston nor over Plaintiffs' lines but on a joint through rate over an all-rail route, i.e. from the mines over the lines of the Texas and New Orleans Railroad Company directly to Shreveport, Louisiana, the Texas and Pacific Railway Company to Texarkana, Arkansas, the Missouri-Pacific Railroad Company (Guy A. Thompson, trustee) to East St. Louis, and the Wabash Railroad Company to Danville. The distance over that route from the sulphur mines is approximately 850 miles to East St. Louis, and is approximately 184 miles from East St. Louis to

Danville, making a total distance of 1,034 miles from the sulphur mines to Danville. As stated, the sulphur mines are in the Galveston area, but the distance from them to the port of Galveston is approximately 60 miles.

(c) The all rail joint through rates on sulphur (Galveston rate) from the sulphur mines to Danville is $9.184 per ton. The Commission found these rates to be on a "depressed basis" in that the combination local rates which would apply in the absence of such joint through rates is $11.686 or $2.502 higher than such joint rates. Such combination local rates are made up of rates of $8.75 from the mines to East St. Louis, and a local rate of $2.95 from East St. Louis to Danville.

(d) There are no joint barge-rail rates in effect either from the sulphur mines or from Galveston to Danville or any other point.[1] The combination barge-rail rate on sulphur from Galveston to Danville is $8.27, composed of Plaintiffs' joint barge rate of $5.32 from Galveston to East St. Louis and Intervening Defendants' rail rate of $2.95 from East St. Louis to Danville. The combination rate of $8.27 does not include unloading and loading and switching charges, etc., at East St. Louis. However, barge lines absorb, or are willing to absorb such charges at East St. Louis. Such charges are for unloading the barges 44 cents a ton, the switching charges are approximately 30 cents a ton, and other charges are approximately 15 cents a ton.

The price of sulphur at Galveston is $1.50 a ton higher when loaded in barges than when loaded in rail cars 60 miles away at the mines. The higher price reflects in part the rail rate of $1.10 per ton from the mines to Galveston, 11 cents for wharfage, 37 cents for unloading from cars to storage bins, 22 cents for transfer from bins to barges, 4.55 cents for stevedoring, and 1.41 cents for pier rental.

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[1] See Thompson v. United States, 343 U.S. 558, for a discussion of through routes, etc.

Such combination rate does not include and the barge lines do not absorb this Galveston item of $1.50 per ton.

(c) Complainants proposed and were refused the establishment of a joint through route and a joint through barge-rail rate of $7.67 for sulphur, not from the sulphur mines but from Galveston to Danville, to be divided $5.41 for the barge lines from Galveston to East St. Louis, and $2.26 for the rail lines from East St. Louis to Danville. The rate was arrived at by adding $1.01 to the Port Sulphur to Danville rate of $6.66. This proposal contemplated that the barge lines would absorb the charges mentioned at East St. Louis but there was no such commitment respecting the $1.50 charge mentioned at Galveston.

1. The case involves a construction of the Interstate Commerce Act as amended by the Act of 1940 respecting water carriers (49 U.S.C.A., Secs. 901, et seq.). Plaintiffs claimed before the Commission and claim here that under such Act the combination rates and charges on sulphur over barge-rail route from Galveston, Texas, through East St. Louis, Illinois to Danville, Illinois, were unreasonable, that they discriminated against Plaintiffs, and that the public interest required that a through barge-rail route and joint through barge-rail rates be established with reasonable differentials, etc.

The Commission, after a full hearing (Reports of December 22, 1952, and January 19, 1954) dismissed Plaintiffs' complaint.

Defendants' first contention here is that the findings and conclusions of the Commission are fully supported by the evidence, that its findings are adequate and in full accord with the Act and that its Order should not be set aside here. We agree that this is true.

Congress has with wholesome care clothed the Commission with the power and made it its duty after, as here,

a full hearing to determine when existing rates are discriminatory, where and under what circumstances through route and through rates should be established, etc. The Commission is given wide discretion and when its findings and conclusions are, as here, supported by the evidence and in accordance with the Act they will not be disturbed by the courts. Alabama Great Southern R.R. Co. v. United States, 340 U.S. 216; Capital Transit Co. v. United States, 97 F. Supp. 614; Interstate Commerce Commission v. Mechling, 330 U.S. 567; McLean Trucking Co. v. United States, 321 U.S. 67; Mississippi Valley Barge Line v. United States, 292 U.S. 282; United States v. Pierce Auto Freight Lines, Inc., 327 U.S. 515; Interstate Commerce Commission v. Union Pacific R.R., 222 U.S. 541; Virginia Ry. Co. v. United States, 272 U.S. 568; Western Pacific Chemical Co. v. United States, 271 U.S. 268; Ayrshire Corporation v. United States, 335 U.S. 573.

2. We have, however, independently of the conclusions reached by the Commission, considered the Record and reached substantially the same conclusion.

As we have pointed out, the Commission in determining the questions was required and we are required to consider not only Plaintiffs' desire for and interest in a through barge-rail route and through joint rate, but the effect thereof if established upon all others concerned. This rule is well stated in Ayrshire Corporation v. United States, 335 U.S. 573, where in considering the rates for the transportation of coal, it is said:

> "Rate structures are not designed merely to favor the revenues of producers and carriers. The Commission has the consumer interest to safeguard as well. And when it undertakes to rationalize the interests of the three, great complexities are often encountered." etc.

The Commission doubtless had in mind this rule when it considered, as we have, the effect of the establishment of the proposed through route and joint rate.[2]

We also attach importance to the fact, as did the Commission, that only Plaintiffs and one Intervenor took part in the proceedings before the Commission, and only Plaintiffs and such Intervenor are here seeking the establishment of such route and rates. No shipper nor consumer of sulphur nor other person is making common cause with Plaintiffs.[3]

We also point to the route which shipments of sulphur would follow in Plaintiffs' suggested through barge-rail

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[2] The Commission says:

"In reaching our conclusions herein we are not unmindful of the provisions of the national transportation policy which call for fair and impartial regulation of all modes of transportation subject to the act, so administered as to recognize and preserve the inherent advantages of each. We do not believe, however, that this policy requires us to force rail carriers, where they maintain a depressed rate to meet water competition to further depress their earnings on the traffic in order to favor the same form of competition. Danville is 184 miles from the end of the barge-line service, and the rail rate for the 184-mile haul is depressed at least from 13.5 to 9.2 percent of first class. If the barge lines can reasonably be expected to participate in this movement, the opportunity to do so should be afforded, not by the establishment of a through barge-rail rate differentially under an all-rail adjustment which is already severely depressed, but by a reduction in the barge rate from Galveston to East St. Louis, or by an increase in the depressed rail rate, or both. There is no allegation here that the all-rail rate, or any factor thereof, is unreasonably low." (Com. 1st Report, p. 407.)

[3] The Commission says:

"As stated, no shipper has evidenced an interest in the establishment of the rate sought, and the rate over the all-rail route which it is intended to meet is on a depressed basis. The defendants urge that their participation in barge-rail routes, as desired by complainants, is not shown to be necessary or desirable in the public interest." (Com. 1st Report, p. 406.)

route and through joint rate, i.e. by barge from Galveston to East St. Louis and by rail from East St. Louis to Danville, with no provisions made for the $1.50 per ton cost and expense of transportation from the sulphur mines to Galveston and of loading, unloading, etc. there. While Plaintiffs are willing to absorb charges of loading, unloading, etc., at East St. Louis, there is nothing to indicate that they are willing to absorb such Galveston charges.

Also, the Commission and we have compared the proposed joint barge-rail rate and the movement of sulphur thereunder with the other rates discussed herein, and the movement of sulphur thereunder. Although it is mandatory that the Act must be so administered as to recognize and preserve the inherent advantages of all modes of transportation, including water transportation, we discover here no violation or deviation from this rule. There is nothing in the record indicating that the refusal of the Commission to grant Plaintiffs' request or to approve the route and rate requested by Plaintiffs failed to preserve the advantages and rights of all parties. When the whole record is considered in the light of all the provisions of the Act and many cases construing same, we think Plaintiffs have not shown their claim of discrimination to be meritorious. Nor is there merit in Plaintiffs' claim that the establishment of the proposed through route and joint through rate is in the public interest. Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591; Interstate Commerce Commission v. City of Jersey City, 322 U.S. 503; Interstate Commerce Commission v. Mechling, supra; Thompson v. United States, 343 U.S. 549; United States v. Great Northern Ry. Co., 343 U.S. 562.

3. Plaintiffs strongly press upon us the decision of the Supreme Court in the Mechling case (I.C.C. v. Mechling, supra). That Court there uses this language:

> "Judicial review of the findings of fact and the expert judgments of the Interstate Commerce Com-

mission where the Commission acts within its statutory authority is extremely limited. And § 307(d) of the 1940 Act authorizes the Commission 'in the case of a through route' to 'prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water'. Cf. United States v. Chicago Heights Trucking Co., 310 U.S. 344, 352-353; Board of Trade of Kansas City v. United States, 314 U.S. 534, 546. But the congressional debates and committee reports on the 1940 Act and the statutory provisions which emerged from this legislative background show that Congress enunciated positive policies and specific limiting standards which it expected the Commission to follow in fixing rates, including 'differentials' between all-rail and water-rail rates. The provisions of the Transportation Act of 1940 which brought water carriers under Interstate Commerce Commission jurisdiction were vigorously opposed in Congress by those who feared that the Commission might raise barge rates in order to enable railroads better to compete with inherently cheaper water transportation. These opponents were repeatedly assured by sponsors of the 1940 Act who advocated Commission regulation of water transportation that the questioned legislation unequivocally required the Commission to fix rates which would preserve for shippers the inherent advantages of barge transportation: lower cost of equipment, operation, and therefore service." etc.

It then held that under the facts in that case the Order of the Commission should not be permitted to stand because not based on adequate findings and evidence. But the facts there greatly differ from the facts here. Here, as has been pointed out, there is neither a showing that Plaintiffs' suggested route and rate is in the public interest, nor that it is fair to shippers, consumers and the public

nerally. Neither have Plaintiffs shown that the existing ates discriminate against them.

The case of Alabama Great Southern R.R. Co. v. United tates (supra) was one where, as here, the Commission as called upon to establish through routes and joint rough rates, and where the Court, citing the Ayrshire ase, points out that the Commission has to safeguard ne interests of the shipper and consumer as well as those f the carrier, etc. In speaking of the Mechling case, the ourt uses this language:

"Appellants also contend that the prescription of differentials in this proceeding deprive them of their inherent advantage contrary to the National Transportation Policy. They point to I.C.C. v. Mechling, 330 U.S. 567, as having established the principle that the lower costs of the large carrier there involved was an inherent advantage, and that the Commission had no discretion to approve a rate structure which would reduce such advantage. They argue that the 'fair and impartial regulation' called for by the National Transportation Policy demands that the rule of the Mechling case be applied impartially to protect the 'inherent advantage' of the rail carriers here.

"In the Mechling case, the Commission had fixed a rate for transportation of wheat east by rail from Chicago at a rate higher if it arrived in Chicago by barge than if by rail or lake. This was a plain case of discrimination. There were different rates provided for equal service without any showing that any additional service was rendered for the additional charge. Here the question is whether the barge lines may charge less than the railroads for the different service they render. There is no unlawful discrimination here as there was in the Mechling case. The differentials providing a lower rate for barge service do not constitute an 'unjust discrimination' by express

facts stated in the prior report will be repeated herein only to the extent necessary for a clear understanding of the issues.

Single-line rail service is provided by defendants from East St. Louis to Danville, and they participate with other defendant rail carriers in joint-line rail service for the transportation of sulphur from Galveston, Tex., to Danville. Beginning with and since 1951, the entire movement of sulphur from the Galveston area, approximating 20,000 tons a year, has been over the all-rail routes. The all-rail rate from Galveston is $9.184 per ton.[1] The combination barge-rail rate from Galveston is $8.27, composed of $5.32 by barge to East St. Louis, minimum 1,500 gross tons, and the rate of $2.95 by rail from East St. Louis to Danville. The complainants suggest a joint barge-rail rate of $7.67 from Galveston, which is based upon a joint barge-rail rate of $6.66 from Port Sulphur, La., to Danville, plus $1.01, the usual difference between rates by barge from Galveston and from Louisiana ports. The barge lines would absorb the charges incident to the transfer to rail cars at East St. Louis.

As was found by the division, the record affords no support for a finding that the present combination barge-rail rate, 91.4 cents lower than the present all-rail rate, is unreasonable for the through service offered thereunder. There also is no evidence affording a basis for a conclusion that the proposed difference of $1.514 between the present all-rail rate from Galveston and the suggested barge-rail rate from Galveston, or any particular differential, is required to remove the alleged discrimination against barge lines and to result in rates that would be consistent with the national transportation policy to preserve the inherent advantages of all modes of transportation. The complainants cite decisions in which such rate

[1] Rates and rate differences stated herein are per ton of 2,240 pounds.

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 8171

DIXIE CARRIERS, INC., COYLE LINES INCORPORATED, AMERICAN BARGE LINE COMPANY, FEDERAL BARGE LINES, INC., *Plaintiffs,*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Defendants,*

THE NEW YORK CENTRAL RAILROAD COMPANY, CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, ILLINOIS TERMINAL RAILROAD COMPANY, AND WABASH RAILROAD COMPANY, *Intervening Defendants.*

Donald Macleay (Macleay and Lynch), of Washington, D.C.; for Plaintiffs Dixie Carriers, Inc., and Coyle Lines Incorporated.

Richard J. Hardy and Nuel D. Belnap (Belnap and McAuliffe), of Chicago, Illinois; for Plaintiffs American Barge Line Company and Federal Barge Lines, Inc.

E. V. Greenwood (Fulbright, Crooker, Freeman, Bates & Jaworski) of Houston, Texas; for all Plaintiffs.

Stanley N. Barnes, Asst. Atty. Gen., of Washington, D.C. and Malcolm R. Wilkey, U.S. Atty., of Houston, Texas, and Edward M. Reidy, Chief Counsel, of Washington, D.C., and Samuel R. Howell, Asst. Chief Counsel and Leo H. Pou, of Washington, D.C.; for Defendants the United

States of America and the Interstate Commerce Commission.

John A. Daily, of Chicago, Illinois, and Palmer Hutcheson, Jr. (Hutcheson, Taliaferro & Hutcheson) of Houston, Texas; for Intervenors, New York Central Railroad Company, Chicago and Eastern Illinois Railroad Company, Illinois Terminal Railroad Company, and Wabash Railroad Company.

E. V. Greenwood (Fulbright, Crooker, Freeman, Bates and Jaworski) of Houston Texas, and John H. Eisenhart, Jr., of Washington, D.C.; for Intervening Plaintiff American Waterways Operators, Inc.

December 31, 1954

Before HUTCHESON, Chief Circuit Judge, and CONNALLY and KENNERLY, District Judges.

KENNERLY, District Judge:

This is a suit by Plaintiffs, Dixie Carriers, Inc., Coyle Lines Incorporated, American Barge Line Company and Federal Barge Lines, Inc., against the Interstate Commerce Commission (for brevity called Commission) and the United States of America, Defendants. The New York Central Railroad Company, the Chicago and Eastern Illinois Railroad Company, the Illinois Terminal Railroad Company and the Wabash Railroad Company have intervened on the side of Defendants and are referred to as Intervening Defendants. The American Waterways Operators, Inc., have also intervened on the side of Plaintiffs and are referred to as Intervening Plaintiffs. The trial was before a three-judge court convened under Sections 2284 and 2325 of Title 28, U.S.C.A.

Plaintiffs moving under the Interstate Commerce Act, as amended by the Transportation Act of 1940 respecting

water carriers (49 U.S.C.A., Secs. 901 et seq.) complain of and seek to enjoin, set aside and annul an order of the Commission with respect to rail rates, barge rates and rail-barge rates on sulphur mines in Texas and approximately 60 miles from Galveston, Texas, but described as being in the Galveston area, through East St. Louis, Illinois, to Danville, Illinois. Specifically, Plaintiff sought in their application before the Commission to have established a through barge-rail route and a joint through barge-rail rate for sulphur from Galveston, Texas, to Danville, Illinois, via East St. Louis, i.e. by barge from Galveston to East St. Louis, and by rail from East St. Louis to Danville. Plaintiffs claimed that the establishment of such route and rate was necessary and desirable in the public interest and that the failure and refusal to establish same discriminated against them as connecting carriers. The order complained of which denied Plaintiffs' application to the Commission was entered in a proceeding before the Commission entitled American Barge Line Company, et al., v. Chicago & Eastern Railroad Company, et al. (I.C.C. Docket No. 30731, reported in 287 I.C.C. 403 and 291 I.C.C. 422.)

Among the several persons who were parties to, intervened in or took part in the hearings before the Commission there were no shippers nor consumers of sulphur. There was one intervenor, the American Waterways Operators, Inc., who appeared on behalf of the "inland water carriers generally throughout the United States", and the Galveston Chamber of Commerce intervened, was represented at the hearings, but did not otherwise participate in the proceedings. But no one purported to participate in the proceedings on behalf of or in the interest of the public generally.

The facts are not greatly if at all in dispute, and are fully shown by the Record. They may be briefly summarized substantially as follows:

proviso of § 305(e) of the Act. 54 Stat. 935, 49 U.S.C. § 905(e)."

We believe the Mechling case is not controlling here.

From what has been said it follows that judgment should be and is entered here for Defendants. Let appropriate decree be drawn and presented.

APPENDIX B

No. 30731

INTERSTATE COMMERCE COMMISSION

AMERICAN BARGE LINE COMPANY ET AL. v. CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY ET AL.

Submitted November 4, 1953. Decided January 19, 1954

On reconsideration, combination barge-rail rate on sulphur from Galveston, Tex., to Danville, Ill., found not shown to be unreasonable; establishment of a joint barge-rail rate on the same traffic found not shown to be necessary or desirable in the public interest; and allegation of discrimination under section 3(4) of the act not sustained. Prior findings, 287 I. C. C. 403, affirmed.

Appearances as shown in prior report and, in addition, *John H. Eisenhart* for an intervener supporting complainants; and *John A. Daily* for defendants.

Report of the Commission on Reconsideration

BY THE COMMISSION:

In the prior report herein 287 I. C. C. 403, decided December 22, 1952, division 3 found that the combination rate on sulphur by barge from Galveston, Tex., to East St. Louis, Ill., and thence by rail to Danville, Ill., was not shown to be unreasonable for the service offered thereunder, that the establishment of a joint differential barge-rail rate as sought was not shown to be necessary or desirable in the public interest, and that the allegation of discrimination against the complaining barge lines under section 3(4) of the Interstate Commerce Act had not been sustained. Upon complainants' petition and replies by defendants, the proceeding was reopened for reconsideration upon argument, which we have heard. The

differences were prescribed, but the prescriptions were based upon a presentation of adequate evidence, which is not the case here.

The circumstances here, insofar as the establishment of a joint barge-rail rate is concerned, are in all respects similar to those in *Algonquin-Missouri Chemical Corp.* v. *A., T. & S. F. Ry. Co.*, 286 I. C. C. 307, wherein division 3 found that the establishment of a joint rate and through route as there sought on sulphur from Port Sulphur, La., to De Soto, Kans., was not shown to be necessary or desirable in the public interest. The complainants there were the Inland Waterways Corporation, operating the Federal Barge Lines, and shipper or receiver located at De Soto. Here, no shipper has evidenced an interest in the rate sought, and the rate over the all-rail route which it is intended to meet is on a depressed basis. In these circumstances, we cannot find that the public interest requires the establishment of the joint barge-rail rate sought.

At the oral argument counsel for complainants agreed that one way the alleged discrimination could be removed would be by the use of $2.26 as a proportional rate for the services of the defendants operating from East St. Louis to Danville, which is the amount received by them as a division of the joint barge-rail rate of $6.66 from Port Sulphur to Danville. He stated, however, that he did not believe that that was one of the issues of their complaint. This belief appears to be correct. The complaint in this respect is directed against the alleged discrimination in favor of rail lines serving Galveston and not Port Sulphur, and what the rail lines receive as their share of the rate from Port Sulphur is not helpful here. The amount received by the East St. Louis-Danville lines in the division of the all-rail rate from Galveston is not shown, but even if it were shown, we do not think a finding of unlawful discrimination under section 3(4) could be supported on the facts presented. The claim here is, not that the com-

plainants are discriminated against in the matter of divisions of joint rates, as was the case in *Western Pac. R. Co.* v. *Southern Pac. Co.*; 55 I. C. C. 71, referred to by the complainants, nor that the separately established rate paid by the shipper as one of the components of a combination rate is greater for the transportation of ex-barge traffic than for ex-rail traffic, which was the situation in *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, also cited by the complainants, but that the separately established rate paid by the shipper on ex-barge traffic beyond East St. Louis is greater than the unpublished division of a joint through all-rail rate received by the rail carriers for the transportation beyond East St. Louis on ex-rail traffic moving from the same origin to the same destination. The comparison is between a rate or charge paid by a shipper and a division of a joint rate received by rail carriers, and is of unlike things. Basically, divisions of joint rates are the result of contractual arrangements between carriers; they are not "rates" or "charges" as those terms are used in section 3(4) of the act. A seemingly contrary opinion expressed in *Western Pac. R. Co.* v. *Southern Pac. Co.*, *supra*, upon which the complainants rely, was made, as above indicated, under circumstances different from those now before us, and is not controlling here.

The rail rate of $2.95 from East St. Louis to Danville, used as a component of the through combination barge-rail rate on complainants' traffic from Galveston to Danville, is also used for similar application on sulphur carried from Galveston to East St. Louis by contract carriers by barge. It will also apply on sulphur moved to East St. Louis by rail carriers not parties to joint rates. The depressed character of this rate, originally established under intermediate application under the fourth section when the rail lines reduced their rate from East St. Louis to Joliet, Ill., to meet barge competition, is shown by its comparison with noncompetitive rail rates of from

$4.70 to $5.82 for lesser hauls in the same general area. A proposal of defendants to further reduce the application of the same rate on traffic to Joliet, in an effort to meet further competition of the barge lines, was suspended upon protest of the barge lines, and was found not shown to be just and reasonable by division 2 in *Crude Sulphur from East St. Louis to Joliet, Ill.*, 270 I. C. C. 231. Had that rate been permitted to become effective the rate from East St. Louis to Danville would now be approximately the same as the rail division of the Port Sulphur-Danville joint rate, but such a rate would then have been available to the traffic of all carriers not parties to joint rates, including traffic moved into East St. Louis by contract carriers by barge. Complainants show that their fully distributed cost for hauling sulphur by water for 1,500 miles, the approximate water distance from Galveston to East St. Louis, is $4.03 per gross ton. Their witness estimated that it costs the barge lines about 29 cents to deliver the traffic to the rail lines at East St. Louis, which would make the total cost $4.32 per gross ton for moving sulphur by barge from Galveston to East St. Louis and delivering it to defendants at that point for movement to Danville. This may be contrasted with complainants' rate of $5.32, for local delivery, and $5.41, as a component of their proposed joint rate, to East St. Louis from Galveston, and suggests the observation that if any reduction in the barge-rail charge from Galveston to Danville is needed it ought to come out of the barge factor and not out of the depressed rail factor.

Upon reconsideration, we find that the findings in the prior report should be, and they are, affirmed.

KNUDSON, *Commissioner*, dissenting:

I am in disagreement with the conclusion reached on the issue under section 3(4) of the act. The complaining barge lines are willing to absorb the charge for the transfer of the sulphur from the barge to the rails at East St. Louis,

and there is here no serious contention that in other respects the circumstances affecting the transportation from East St. Louis to Danville are any different for the ex-barge than for the ex-rail traffic. It is true that the record fails to show the division of the joint all-rail rate received by the East St. Louis-Danville defendants, but it is evident that the division is less than the local rate from East St. Louis to Danville, which local rate must be paid by the shipper on this ex-barge traffic.

In *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, the Supreme Court held that the provisions of section 3(4) as applied to the facts in that case meant "that Chicago-to-the-east railroads cannot lawfully charge more for carrying ex-barge than for carrying ex-lake or ex-rail grains to and from the same localities, unless the eastern haul of the ex-barge grain costs the eastern railroads more to haul than does ex-rail or ex-lake grain." Although on all-rail traffic the amount received by the East St. Louis-Danville lines is a division of the through charge, nevertheless it seems to me that the principle stated by the Supreme Court has application. The cause for complaint lies in the fact that these lines demand the rate of $2.95 per long ton applying from East St. Louis locally to Danville on traffic originating at New Gulf that may move from Galveston to East St. Louis by barge, although they receive a division, which it must be assumed is less than $2.95, of the joint all-rail rate on traffic for the same destination moving from New Gulf to East St. Louis by rail. Such a difference between the amounts received or demanded for the transportation beyond East St. Louis could have justification only if a substantial difference in the amount or character of the service beyond East St. Louis were shown. No such a showing has here been made. The evidence is to the contrary.

Section 3(4) of the act, among other things, prohibits carriers subject to part I of the act from discriminating "in their rates, fares and charges between connecting

lines," and the term "connecting lines" is therein defined as including common carriers by water subject to part III of the act. Complainants here are such common carriers. As stated in *Western Pac. R. Co. v. Southern Pac. Co.*, 55 I. C. C. 71, 81, "Wherever and whenever the discrimination is practiced as between carriers and connections in cases with respect to which the service is rendered under the same circumstances and conditions, unlawful results follow." The Commission there found, at page 73, that "The expression of rates and charges in the form of divisions makes them none the less rates and charges which may be discriminatory." That finding was a necessary preliminary to the conclusion therein reached that complainant was being discriminated against by defendants in the matter of divisions of joint rates, in violation of provisions of the act similar to those now in section 3(4). If divisions of joint rates were a "charge" under the law as it stood then, they must be a "charge" under the law as it stands today.

To my mind it is obvious that the complaining barge lines are being subjected to unlawful discrimination in and to the extent that the defendants operating from East St. Louis to Danville make a greater charge as compensation for their services when the transportation of this sulphur is by barge from Galveston to East St. Louis than they receive for such services when the transportation is by rail from New Gulf to East St. Louis.

In my separate expression in connection with the prior report herein, I dissented also from the finding there made, and here affirmed, that the establishment of a joint barge-rail rate on this traffic was not shown to be necessary or desirable in the public interest. I am now satisfied that such a finding would not be needed if the relief which I would accord under section 3(4) of the act were granted.

Commissioners Mahaffie and Alldredge authorize me to state that they join in this expression.

Commissioner Arpaia did not participate in the disposition of this proceeding.

Office - Supreme Court, U. S.
AUG 31 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 233

DIXIE CARRIERS, INC., COYLE LINES INCORPORATED, AMERICAN BARGE LINE COMPANY, FEDERAL BARGE LINES, INC., *Appellants*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL., *Appellees*

Appeal from the United States District Court for the Southern District of Texas, Houston Division

REPLY OF APPELLANTS TO MOTIONS TO AFFIRM

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STATEMENT

Appellees have filed two motions to affirm, one by the Interstate Commerce Commission and the other by the railroads which were the defendants in the Commission proceeding. The United States, the statutory defendant, did not file a motion to affirm and did not support in the lower court the construction of section 3(4) of which appellants complain.

The two motions are quite similar as to reasons advanced for affirmance. However, except for an attempt

to distinguish *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, the propositions relied upon bear no relation to the reasons given by the Commission for its construction of the statute.

ARGUMENT

I

Except for general language expressing agreement with the conclusions of the Commission, appellees can show nothing in the opinion of the lower court which rules upon the principal question involved: Is a division of a joint all-rail rate charged on traffic received from a railroad connection a "rate" or a "charge" within the meaning of section 3(4) of the Interstate Commerce Act so as to constitute proof of discrimination when a higher local rate is assessed for the same service on the same traffic received from a barge line connection?

Appellees seek to excuse the failure of the lower court to rule directly on that question on two grounds: (1) That the question was not "specifically" raised in the complaint before the Commission, and (2) that the question was "waived" at the oral argument.

Paragraph V of appellants' complaint before the Commission specifically alleged a violation of section 3(4) by reason of the rates and charges maintained by the appellee railroads. That is sufficient to raise the issue which required the Commission to rule on the question of whether a division is a rate or charge within the meaning of section 3(4). It was not necessary to plead the evidence as to that matter, nor would it have been proper to plead the affirmative of the question under discussion, such being a pure conclusion of law.

That the question of statutory construction involved in this appeal was properly before the Commission is implicit in its report on reconsideration since, if it were not, the ruling of which appellants complain would not have been made. This circumstance also answers appellees' claim that the issue or question was "waived". The statement of counsel for appellants at oral argument which is asserted as constituting the waiver, related only to the matter of remedy and not to the issue of the existence of discrimination between connecting carriers.

II

Appellees seek to avoid the impact of this Court's decision in the *Mechling* case by alleging that that case did not involve section 3(4) discrimination predicated on a difference between an all-rail division and a separately-established rate on barge traffic. Their position is untenable because: (1) The broad condemnation of inter-carrier discrimination found in the *Mechling* case is directed, as is the statute, against the substance, not the form, of discrimination. (2) While the Court in the *Mechling* case made no reference to all-rail divisions by name, the most important factual occasion of the discrimination complained of, there pertained to the exact comparison here made, i.e., between a division east of Chicago of an all-rail joint rate from Illinois origins and a separately-established rate assessed upon ex-barge traffic from the same origins.

This Court in the *Mechling* case held unlawful the Commission's assumption, in the decision there reviewed, that section 3(4) had no application to "discrimination if accomplished by through rates". Such assumption was pronounced "basic error" because it "would permit the destruction or curtailment of . . .

barge transportation wherever the transported goods were carried beyond the end of the barge line". Appellees now assert that section 3(4) has no application to discrimination accomplished by through rates where the difference in treatment is between a division and a separately established rate. Although it is apparent that discrimination so achieved would permit destruction or curtailment of barge service in the same manner and degree as if accomplished by preferential proportional rates, the *Mechling* case is said to be restricted only to discriminations assuming the latter form.

This Court could not have intended so ineffectual a result. If its holding were so restricted, it would not have reached what was factually the *most important* instance of discrimination in the rate adjustment before it—the movement of grain from origins in Illinois. The all-rail movement of grain from such origins, was described by the Commission as "the principal traffic here considered", and as being handled by railroads operating from Chicago to the East under "divisions" of "through one-factor rates". See *Grain Proportionals, Ex-barge to Official Territory*, 262 I.C.C. 7 (1945) at pages 13 and 30. This Court found it unnecessary to make specific reference to this distinction in method, while nonetheless condemning the substance of the discrimination.

III

Appellees cite and quote from several cases which stand for the proposition that a division is not a proper measure of the lawfulness of a local rate in a shipper-carrier relationship. In the framework of this case, those decisions simply mean that a shipper of traffic originating at East St. Louis could not establish the

unlawfulness of his local rate from East St. Louis to Danville by comparison with the East St. Louis-Danville division of a joint through rate from a point such as Galveston. Similarly, in the context of the *Mechling* case, the cited decisions would prevent a shipper of grain originating at Chicago from complaining of the lower division or proportional rate exacted by the railroads operating eastward from Chicago on grain originating beyond Chicago at a place such as Morris, Illinois. Appellants do not quarrel with the soundness of this rule. It has, however, no application in the premises.

A division is not a charge to the shipper because it is not demanded from him; he pays the through rate as a whole. No interest of his is affected by the manner of apportionment between carriers of that through rate.

As between carriers, however, a division is the charge demanded from a connecting line and can be a means of discrimination whenever a higher division or a higher separately established rate is demanded on traffic of another connecting line. Where a railroad practices discrimination among its connections by variable divisions unduly preferring certain lines, it violates the express provisions of section 1(4) of the Act.* Where the preferentially varying charges demanded from connections are expressed as to each in the form of separately published rates, section 3(4) is violated under any view of the *Mechling* case. But where, as here, the preferential variance is between a division and a higher separately-established rate, appellees would have the

* That section provides in part: "It shall be the duty of every common carrier subject to this part . . . in case of joint rates . . . to establish . . . divisions . . . which shall not unduly prefer or prejudice any of such participating carriers."

Court believe that there is no law to prohibit such discrimination. They rely wholly on a principle of law pertaining to a carrier's relations with its shippers, as if it pertained equally to a carrier's relations with connecting carriers. That principle, entirely sound in its proper application, may not, however, be relied upon to exempt from section 3(4) discrimination between carriers brought about by a division. Prior to the enactment of section 1(4) in its present form, and when the only prohibition against discrimination in rates and charges between connecting carriers was in the provision which now is section 3(4), the Commission so recognized in *Western Pacific R. Co.* v. *Southern Pacific Co.*, 55 I.C.C. 71, 81, when it said (Italics supplied):

> We have said many times that ordinarily the passenger or shipper is not interested in the division of joint rates between carriers. * * * It cannot, however, be said that the carrier having the strategical advantage may lawfully accept from one of its connections a division which permits that competitor to share on fair and compensatory terms in the competitive traffic and at the same time demand from another connection for the same service in movement of the same competitive traffic a division so high as to make it impossible for it to share therein on a compensatory basis. In other words, if the carrier having the strategical advantage were to admit one competitor to share in the traffic and exclude another *by refusing to enter into any arrangement with it*, or effected the same exclusion by exacting divisional arrangements which would prohibit participation by that connection in the traffic, *the discrimination would be unlawful.*

The Commission in that case held as to statutory prohibition of discrimination in charges between connecting carriers (p. 73):

The expression of rates and charges in the form of divisions makes them nonetheless rates and charges which may be discriminatory.

IV

Appellants cited the Commission's decision in *Denver & R.G.W.R. Co.* v. *Union Pacific R. Co.*, 287 I.C.C. 611, 660 (the so-called *Ogden Gateway* case), in support of an affirmative resolution of the second question presented by this appeal, i.e., that participation with one and not another connection in joint rate arrangements on traffic moving between the same origins and destinations constitutes unlawful discrimination in rates and charges under section 3(4). That decision, so far as here relied upon, was upheld by the District Court for the district of Nebraska, Omaha Division, in opinion filed October 22, 1954. Appellees assert that this case is distinguishable. Insofar as appellants rely upon that decision, however, it presented and decided the precise issue here in question.

While the Commission in the *Ogden Gateway* case was concerned as to many of the routes involved, with questions of the existence of or public interest in through routes under sections 15(3) and (4), the particular situation where section 3(4) was relied upon in prescribing through routes to eliminate discrimination, presented a distinct issue which was separately considered and decided. In that instance, the Union Pacific interchanged traffic under joint rates with one of its rail connections (the Bamberger line) and refused such arrangements with the D. & R. G. on traffic between the same specified points via the same junction. As to this situation the Commission had found that there existed no through routes between the Union Pa-

cific and the D. & R. G. and that there was no foundation for prescribing such routes under section 15. In view of the discrimination, however, the Commission prescribed joint through routes and rates in a separate and distinct paragraph dealing with that one situation, resting its decision solely upon section 3(4). The Nebraska Court similarly treated the section 3(4) issue in a separate paragraph and upheld the Commission's determination.

Appellees assert that the *Ogden Gateway* case did not involve any issue as to whether a division is a rate or charge under section 3(4). That assertion apparently rests upon the fact that the Commission there chose to predicate its decision upon the affirmative of the second question here presented for decision; "whether Section 3(4) makes unlawful the action of a carrier by railroad in participating with one connecting carrier in through routes and joint rates, while refusing similar participation to another connecting carrier seeking to engage in the same through transportation, where the said rail carrier performs the same service in each instance." There is no probative distinction between the facts before the Commission in that case and those here presented. In both cases, the offending carrier insisted upon its local rate on traffic interchanged with one of its connections while accepting a lower division on traffic interchanged with a preferred connection to and from the same points.

This serves only to demonstrate forcefully that the two questions are not necessarily dependent on one another and that a correct resolution of either would compel the removal of the discrimination of which appellants complain. The point was specifically and succinctly made by Commissioner Eastman in his con-

curring opinion in the *Western Pacific* case (supra). After first indicating his agreement with the majority that a decision was a "rate", "fare", or "charge" within the meaning of section 3(4), he then went on to state (page 84):

> * * * However, this is beside the point, for if a carrier refuses without just cause to make a joint fare with one connecting carrier upon as favorable a basis as with another, which is in substance the allegation in this complaint, it is, I believe, discriminating in its joint "rates and charges," contrary to the provisions of the paragraph in question.

See also *Ann Arbor R.R. Co.* v. *B. & O. R.R. Co.*, 136 I.C.C. 578 (Div. 3, 1927).

V

Appellees assert a lack of evidence "pro or con" as to the similarity of services rendered upon ex-rail versus ex-barge traffic. A passage from the *Ogden Gateway* case is quoted to the effect that transportation conditions must be shown to be similar to support a finding under section 3(4). The quoted passage pertains to an alleged discrimination by reason of the offending railroad joining with certain of its connections in through routes and joint rates via one junction while refusing to join the complaining railroad in such routes and rates via a *different* junction. In the instant case, however, the East St. Louis-Danville railroads join their preferred railroad connections in through routes and joint rates while refusing to join with appellants on any basis lower than their local rate via the *same* junction.

In any event, appellees are in error in their assertion that the record is bare on the point. Traffic brought to East St. Louis by either rail line or water line connections would be transported on to Danville by the appellee carriers in precisely the same manner and with the same physical facilities. The only distinction is that in the case of the barge connection, instead of a simple switching operation to move the cars from one railroad to another, the traffic must be transferred from barge to cars and the cars then switched from the terminal to the connecting rail line. Appellants testified that the present barge rate from Galveston to East St. Louis includes all accessorial services at the latter point, including such transfer and switching, which would place the loaded cars on the tracks of appellee rail lines in exactly the same fashion as cars received from connecting rail lines. Appellee rail lines expressed some disagreement with appellant's statement of the tariff provisions, as the tariffs in question mentioned specifically only the matter of switching, and did not spell out the situation with respect to the intermediate step of transfer. In order, however, that there be no doubt about the identical service to be performed by the appellee rail lines in either event, appellants made it clear beyond question that they stood willing to absorb all costs necessarily incident to placing the loaded cars on the tracks of the appellee rail carriers (Transcript, page 23), and that fact was noted in the decision of Division 3 of the Commission (*American Barge Line Co. et al.* v. *Chicago and E. I. R. Co., et al.*, 287 I.C.C. 403, 405) where it said, "From the joint barge rate of $5.32 the barge lines do absorb the cost of switching the loaded cars from the barge terminal at East St. Louis. * * * The tariff is silent concerning absorption of the

unloading charges; however, the barge lines are willing to absorb those charges."

Thus the record contains ample evidence that the services to be performed by appellee rail lines are the same in each case.

VI

Appellees suggest that the Commission could not grant the relief from discrimination requested in the absence of proof of public interest under section 15(3). This contention has been expressly rejected by this Court in *Chicago, I. & L. R. Co.* v. *United States*, 270 U.S. 287 (1926). In that case this Court had under review a Commission determination under section 3(3) [now section 3(4)] of the Act that refusal of steam railroads to interchange traffic with electric lines on a reciprocal switching basis, while contemporaneously maintaining such arrangements with other preferred steam lines, was an unlawful discrimination. Complainant in that case (*Chicago, Lake Shore & S. B. Ry. Co.* v. *L. E. & W. R. R. Co.*, 88 I.C.C. 525 (1924)) had conceded that there was no public interest in the relief requested, i.e., "that the steam roads were serving their industries adequately at the time of hearing and that the electric line wished to divide the business". This Court stated the grounds upon which the railroads sought reversal of the Commission's order as follows at page 292:

> The steam railroads contend that, in effect, the order [entered under section 3(3), now 3(4)] directs them to establish through routes and joint rates, or to allow a common use of terminals; that such extensions of service can be legally made only upon a finding that public convenience and necessity require them . . . and that, without making such

> a finding, the Commission has, under the guise of a discrimination order, compelled them to extend their service. * * *

The Supreme Court answered this contention in simple direct language as follows at pages 292 and 293:

> The order does not require the steam railroads to extend any service to the South Shore. It leaves them free to remove the discrimination by any appropriate action. * * * Whenever discrimination is, in fact, practiced, an order to remove it may issue.

VII

Appellees suggest that this appeal contains no "substantial" question. The fundamental matter at stake is the survival of a Congressional prohibition of discrimination as a meaningful enactment. If the construction which the Commission has in this case placed upon the scope of section 3(4) is allowed to prevail, there can be no effective obstacle in the path of railroads who may find it to their interest to freeze out water carriers from participation in traffic moving beyond barge ports of discharge. Under any guise, discriminatory charges for transportation beyond such ports constitute an effective deterrent to the use of barge service. The effect of a discrimination is gauged by its severity, not its name.

CONCLUSION

It is respectfully submitted that the Motions to Affirm are without merit and should not be granted.

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Proof of Service

In compliance with the applicable provisions of the Revised Rules of the Supreme Court of the United States, I, Donald Macleay, one of the attorneys for the several appellants on whose behalf the foregoing Reply of Appellants to Motions to Affirm is submitted, and a Member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing document on counsel for the several parties to this proceeding, as follows:

1. On the United States of America by mailing copies in duly addressed envelopes with first class postage prepaid to:

Honorable Simon E. Sobeloff
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

Honorable Stanley N. Barnes
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Department of Justice
Washington 25, D. C.

and with air-mail postage prepaid to:

Malcolm R. Wilkey, Esquire
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Southern District of Texas
Room 205, Post Office Building
Houston, Texas.

2. On the Interstate Commerce Commission by mailing copies in duly addressed envelopes with first-class postage prepaid to

Samuel R. Howell, Esquire
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Interstate Commerce Commission
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Assistant General Counsel
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3. On the New York Central Railroad Company, Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad Company, and Wabash Railroad Company, by mailing copies in duly addressed envelopes with air-mail postage prepaid to

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This the 31st day of August, 1955.

DONALD MACLEAY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 233

DIXIE CARRIERS, INC., COYLE LINES INCORPORATED, AMERICAN BARGE LINE COMPANY, FEDERAL BARGE LINES, INC., *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL., *Appellees*.

On Appeal From the United States District Court for the Southern District of Texas

BRIEF FOR THE APPELLANTS

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UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL., *Appellees*.

On Appeal From the United States District Court for the Southern District of Texas

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the District Court appears at 129 F. Supp. 28 (R. 45-55). The opinion of the Interstate Commerce Commission on reconsideration, which affirmed the prior report of Division 3, appears at 291 I.C.C. 422 (R. 29-35). The opinion of the Commission, Division 3, appears at 287 I.C.C. 403 (R. 21-28). The report proposed by the Commission's Hearing Examiner, which was rejected by Division 3, is annexed as an exhibit to the complaint in the lower court (R. 10-21).

JURISDICTION

The judgment of the three-judge District Court was entered on February 16, 1955 (R. 55-56). On the same date appellants filed their motion for a new trial and to amend findings of fact and conclusions of law (R. 56-60). The District Court entered its order denying that motion on March 28, 1955 (R. 60-61). Appellants filed their notice of appeal on May 17, 1955 (R. 1-2). The jurisdiction of this Court rests on 28 U.S.C. 1253 and 2101(b). Probable jurisdiction was noted on October 10, 1955 (R. 152).

QUESTIONS PRESENTED

The questions presented involve a matter of statutory construction and application which arises out of the decision of the Interstate Commerce Commission of January 19, 1954 (291 I.C.C. 422), affirming a prior decision by Division 3 of the Commission of December 22, 1952 (287 I.C.C. 403). That decision denied the relief sought by appellants, who are regulated common carriers by water, in their complaint against Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad Company, The New York Central Railroad Company, and Wabash Railroad Company, all of which are common carriers by railroad operating (so far as concerns the issues of this case) between East St. Louis, Illinois, and Danville, Illinois, and with which appellants connect at East St. Louis.

The matter complained of is the refusal by the said railroads to join with appellants in joint rate arrangements for the transportation of sulphur from Galveston, Texas, to Danville, and the charging by said railroads of their East St. Louis—Danville local

rail rate on ex-barge sulphur originating at Galveston and delivered to them by appellants at East St. Louis, while contemporaneously joining with connecting railroads at East St. Louis in a joint through rate from Galveston and nearby producing points out of which said railroads accept a secret, contractual division less than said local rate. The services rendered by the said railroads from East St. Louis to Danville on the ex-barge sulphur are the same as on the through all-rail sulphur. The Commission held, as a matter of statutory construction, that the circumstances stated did not constitute discrimination in rates and charges between connecting carriers within the meaning of Section 3(4) of the Interstate Commerce Act [49 U.S.C. section 3(4)].

The dismissal of the complaint turned only on a question of statutory construction, the essential facts not being in dispute.

The questions presented by the appeal are:

1. Whether a division of a joint through rate is a "rate" or "charge" within the meaning of those terms as used in Section 3(4) of the Interstate Commerce Act [49 U.S.C. 3(4)].

2. Whether Section 3(4) makes unlawful the action of a carrier by railroad in participating with one connecting carrier in through routes and joint rates, while refusing similar participation to another connecting carrier seeking to engage in the same through transportation, where the said rail carrier performs the same service in each instance.

3. Whether the circumstances relied upon by the Commission as warranting the difference in

Incorporated and Dixie Carriers, Inc., operations on the Gulf Intracoastal Canal between Galveston and New Orleans (R. 78). Port Sulphur is about 60 miles below New Orleans (R. 77). The appellants which operate on the Mississippi River join those which operate on the Canal in through service by water from Galveston to East St. Louis (R. 78). They transport sulphur from Galveston on port-to-port rates (R. 76-78; Ex. 1, R. 76, 114) and from Port Sulphur on joint barge-rail as well as port-to-port rates (R. 77; Ex. 1, R. 77, 114). In the period 1947, 1948, 1949 and 1950, the sulphur handled by American Barge Line produced revenue equivalent to 16.6 percent, 11.7 percent, 10.5 percent and 10.6 percent of its total revenues (R. 92).

The railroad appellees[1] operate rail routes from East St. Louis to Danville (R. 77). Those rail routes are available beyond East St. Louis on traffic brought into East St. Louis by barge as on traffic brought in by rail carriers (R. 80).

Sulphur is produced at Port Sulphur and at points in Texas nearby to Galveston. New Gulf, Texas, is a representative mine location (R. 79). The Southern Pacific and the Texas & Pacific in connection with the Missouri Pacific provide rail routes from Texas origins up to East St. Louis and are the railroad connections of the railroad appellees at that point (R. 79).

The difference in the treatment by railroad appellees of appellants as compared with connecting south-

---

[1] Chicago & Eastern Illinois Railroad Company, New York Central Railroad Company, Illinois Terminal Railroad Company, and Wabash Railroad Company.

western rail lines is shown by the following table of rates, such rates, as well as other money figures used herein, being expressed per gross ton of 2240 pounds unless otherwise specified:

Local rates:	All-Rail	Barge-Rail
From Galveston to East St. Louis	$8.736[2]	$5.32[3]
From East St. Louis to Danville	2.95[4]	2.95[4]
Aggregate of *local* rates	$11.686	$8.27
Price Differential when shipped by Barge		1.50[5]
Barge-rail aggregate of locals plus price differential		$9.77[6]
All-rail joint through rate from Galveston to Danville	$9.184[2]	
Shrink in all-rail through rate below aggregate of locals	$2.502	
Shrink in barge-rail through rate below aggregate of locals		0

[2] Ex. 1, R. 76, 114. These rail rates are the same from all sulphur-producing points in Louisiana and Texas.

[3] Barge rate from Galveston to East St. Louis which includes the unloading of the sulphur into cars and the absorption by Federal of switching charges at East St. Louis (R. 83, 84, 85).

[4] Ex. 3, R. 94-95, 115.

[5] This reflects certain costs incurred by the shipper in handling sulphur from mines to storage on wharves at Galveston, Texas (R. 88-89).

[6] Except to the extent that a part of the barge rate may be absorbed by the Galveston shipper (R. 81-82) in competing with the Port Sulphur shipper whose barge rates are $1.01 lower (R. 78), this aggregate of locals via barge-rail plus the price differential is the figure to compare with the all-rail joint rates when measuring the competitive relation between carriers (R. 80-81).

they are to participate in traffic (R. 81). While the differential produced by appellants' proposed rate would be very nearly eliminated by application of that pricing practice, the shipper advised that under the proposed barge-rail rate the barge lines would get some sulphur from Galveston (R. 81, 93). It was explained that this is "because of some absorption made of the charges, transportation charge, from Galveston to New Orleans" (R. 81-82).

Appellants' proposal for a joint barge-rail rate from Galveston to Danville was rejected by the railroads (R. 79). Thereafter the appellant filed a formal complaint against the railroad appellees with the Interstate Commerce Commission which was docketed as No. 30731, *American Barge Line Company* v. *Chicago & Eastern Illinois Railroad Company* (R. 62-64).

The allegations in that complaint (R. 62-64), with respect to violations of section 3(4) of the Interstate Commerce Act are as follows: In paragraph I appellants alleged their status as connecting carriers at East St. Louis of the railroad appellees who were the defendants in complaint (R. 62). The Chicago & Eastern Illinois, in its answer, alleged that it had no information as to the truth or falsity of that allegation (R. 69). The Wabash admitted the allegation (R. 70). The record contains no answer for the other railroad appellees.

The pertinent portions of the allegations in paragraph III read as follows (R. 63):

> That the defendants, to the extent they participate in the transportation, maintain on sulphur in carloads from Galveston, and other origins in Texas to Danville, Illinois, joint rates over

> through all-rail routes while contemporaneously refusing to join complainants in joint differential rates over through barge-and-rail routes from Galveston to Danville . . . that said refusal of the defendants is discriminatory against complainants as connecting carriers, said discrimination being in favor of connecting carriers by railroad with whom said defendants participate in the maintenance of through all-rail routes and joint rates thereover.

The pertinent portion of the allegations in paragraph V read as follows (R. 63-64):

> That by reason of the facts stated in the foregoing paragraphs the defendants . . . are maintaining rates and charges which are discriminatory against complainants as connecting carriers in violation of section 3(4) thereof.

By their complaint, appellants asked the Commission to order defendants "to cease and desist from the aforesaid violations of said Act, and to require the defendants to establish such through routes as the Commission may deem reasonable and just and otherwise lawful." Appellants also prayed "that such other or further order or orders be made as the Commission shall consider proper in the premises" (R. 64).

In paragraphs III and V of their complaint, appellants also alleged that the existing rates over the barge-rail routes from Galveston to Danville are excessive and unreasonable, and that the railroad appellees have refused to establish and maintain reasonable through routes and joint rates, in violation of Sections 1 and 307(d) of the Interstate Commerce Act (49 U.S.C., Sections 1 and 907(d)), and that it is necessary and desirable in the public interest for the

appellants and the railroad appellees to establish through barge-rail routes and joint rates thereover with reasonable differentials under the all-rail rates (R. 63, 64). This brief will take no further note of those allegations nor of the proof with respect thereto. Instead, the subsequent development of the facts, including the proceedings before the Commission and in the lower court, will be primarily concerned with the issue of alleged discrimination between connecting carriers in violation of Section 3(4), that, in the opinion of appellants, being the primary issue before the Court in this proceeding.

Hearing was had before a Hearing Examiner of the Commission at New Orleans, La., on March 13 and 14, 1951. The record there made is a part of the record here (R. 74-118).

The evidence of the appellants on the Section 3(4) issue showed the facts stated above. Appellants believe that none of the evidence offered by the railroad appellees could be characterized as in defense of the alleged violation of Section 3(4). To the contrary, certain of that evidence serves further to establish the existence of such violation.

The following appears on the point in the cross-examination of witness R. L. Sweet, Chief of the Commerce Bureau, New York Central Railroad Company, one of the railroad appellees (R. 103):

> Q. (By Mr. Belnap) Do the defendant railroads object to joining the complaining barge lines in through routes at a single factor joint rate on sulphur from Galveston by East St. Louis to Danville?
>
> A. I don't think so, if we get our $2.95 east of East St. Louis.

Q. You are willing to join a single factor through rate?

A. I wouldn't be in a position to say that, but I don't think there would be any quarrel with lines east of East St. Louis if they get their $2.95.

The following appears in the subsequent cross-examination of the same witness (R. 104):

Q. Do you make your through Danville all-rail by adding the local rate of $2.95 to the $8.736 [rail rate to East St. Louis]?

A. No, sir.

Q. Why do it different with barge lines than rail connections?

A. We don't want to participate with the barge lines and reduce our earnings east of East St. Louis.

Q. You mean it gives you something less than your local rate?

A. That's right.

Q. Don't you participate on that basis with rail lines, taking something less than your local rate?

A. We do.

Later that witness again stated that the rail carriers did not want to receive from ex-barge sulphur "anything less than $2.95 east of East St. Louis" (R. 104). Thereupon, counsel for the railroad appellees said (R. 105):

Mr. Day: Mr. Examiner, Mr. Sweet was only called as a witness to give facts, not to set the policy of any of these Danville lines, and I am going to straighten out the matter of whether he has authority to commit these defendants to join in through rates with the barge lines. I am sure he hasn't got it. We do oppose and resist the establishment of joint rates with the barge lines.

establishment of through routes and joint rates. The question of law as to whether, under the circumstances of this case, a division of an all-rail rate is a "rate" or "charge" as those terms are used in Section 3(4) is not even posed in the opinion.

Because the opinion filed by the lower court did not, at least in specific terms, pass upon the questions urged in the brief and argument before the lower court, appellants filed on February 16, 1955, their motion for new trial and to amend findings of fact and conclusions of law (R. 56-60). The court denied that motion on May 28, 1955 (R. 60-61). This appeal followed (R. 1-3):

SUMMARY OF ARGUMENT

I. The matter complained of before the Interstate Commerce Commission involves discrimination in fact, first with respect to a difference in joint rate arrangements and second with respect to the charge demanded on Galveston sulphur handled ex-barge from East St. Louis to Danville as compared with the lower compensation accepted by the railroad appellees for similar service in the handling of all-rail sulphur from Texas. To the extent that the Commission's order of dismissal is based on the legal theory that such discriminations in fact are not prohibited by Section 3(4) of the Interstate Commerce Act, the order is beyond the power of the Commission and should be set aside.

II. When a carrier refuses without just cause to make joint rate arrangements with one connecting line upon as favorable a basis as with another, Section 3(4) is violated. This has been repeatedly held by the Commission and the Courts when the complainant and

the favored connecting lines were both railroads. *New York & N. Ry. Co.* v. *New York & N.E.R. Co.*, 3 I.C.R. 542. 4 I.C.C. 702 (1891). *Denver and R. G. W. R. Co.* v. *Union Pacific R. Co.*, 287 I.C.C. 611 (1953), order sustained in 132 F. Supp. 72 (1954). Appellants are common carriers by water subject to Part III of the Interstate Commerce Act. By definition added to Section 3(4) in 1940, that status constitutes them "connecting lines" which are entitled to protection against discrimination in rates and charges in favor of connecting rail lines and adverse to them. It follows that to establish a joint rate with a railroad connection well below the combination of local rates which otherwise would apply and refuse, at the same time, without just cause to participate with a barge line connection in any through arrangement other than on the basis of the combination of locals, is, as a matter of law, a category of discrimination in rates and charges which Section 3(4) prohibits. Section 3(4) empowers the Commission to prescribe rates via barge-rail routes lower than via corresponding all-rail routes as a means of curing Section 3(4) discrimination. *U. S. War Department* v. *A. & S. Ry. Co.*, 92 I.C.C. 528 (1924). The shrink in the joint all-rail rate below the full combination of locals points to the need of a shrink below the combination of locals via the barge-rail route to accomplish a non-discriminatory relation. While the precise barge-rail rate is for the Commission to decide, it is within the function of this Court to rule that such determination must proceed upon a correct construction of the statute applied to the evidence in the record before it. For the Commission to rule that it had *no* evidence on which to determine a non-discriminatory joint barge-rail rate is, for one thing, to ignore the re-

treatment between appellants and the rail connections of the defendant railroads were legally sufficient for the purpose.

4. Whether the conclusion of the Commission is supported by adequate findings and substantial evidence.

STATUTES INVOLVED

The statutory provision primarily involved is Section 3(4) of the Interstate Commerce Act [49 U.S.C. 3(4)], as follows:

> (4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

The National Transportation Policy [49 U.S.C., preceding 1, 301, 901, and 1001], which by its terms permeates the entire Interstate Commerce Act and governs the administration and enforcement of all of its provisions, is as follows:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this

Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

STATEMENT OF THE CASE

The controversy in this case stems from a difference in treatment by railroads which operate from East St. Louis, Illinois, to Danville, Illinois, of their barge-line connections as compared with their rail-line connections at East St. Louis, in respect to through routes and joint rates on sulphur from Galveston and nearby points in Texas to Danville.

The appellants are those barge-line connections. They are common carriers by water whose operations, in so far as involved in this case, include the following: for Federal Barge Lines, Inc., and American Barge Line Company, operations on the Mississippi River between East St. Louis, Illinois, and New Orleans and Port Sulphur, Louisiana (R. 76, 91); for Coyle Lines

governing statute. *United States* v. *Missouri P. R. Co.*, 278 U. S. 269 (1929). When discrimination which the Act prohibits is present, the Commission is without discretion to withhold relief. *Mitchell* v. *United States*, 313 U. S. 80 (1941).

ARGUMENT

That the evidence before the Commission showed discrimination *in fact* between connecting lines is hardly open to doubt. Such discrimination is clearly present in two forms. *First*, there is discrimination in fact when the railroad appellees refuse to enter into joint rate arrangements with appellants while joining in such joint rate arrangements with connecting lines of railroads. Such discrimination exists (a) by reason of the arrangement in the one case and not in the other and (b) because the combination rate level forced on the barge-rail traffic by the railroad appellees is not on as favorable a basis as the joint all-rail rate level in relation to the all-rail combination of locals. *Second*, there is discrimination in fact when the railroad appellees demand and collect their full local rate of $2.95 from East St. Louis to Danville on Galveston sulphur received from barge lines while accepting, for the same service, a *lesser* amount in the form of a division of a joint rate when sulphur from Texas is received from a connecting rail line. The question for decision as to both types of discrimination is whether, as a matter of law, they are within the purview of Section 3(4).

Discrimination prohibited by Section 3(4) results when a railroad enters into joint rate arrangements with one of its connecting lines (rail or water) and refuses to enter into similar arrangements with another connecting line for the through movement of like traffic between like origins and like destinations under similar conditions

The report of Division 3 devotes one sentence to the issue of discrimination, reading (R. 26-27):

> The record before us . . . affords no basis for a finding of unlawful discrimination under section 3(4) of the act.

In the report of the Commission on reconsideration, the only thing added with respect to discrimination in fact within the first category, is the second sentence in the following finding (R. 30):

> As was found by the division, the record affords no support for a finding that the present combination barge-rail rate, 91.4 cents lower than the present all-rail rate, is unreasonable for the through service offered thereunder. There also is no evidence affording a basis for a conclusion that the proposed difference of $1.514 between the present all-rail rate from Galveston and the suggested barge-rail rate from Galveston, or any particular differential, is required to remove the alleged discrimination against barge lines and to result in rates that would be consistent with the national transportation policy to preserve the inherent advantages of all modes of transportation.

The vice in the above finding, when treated as dispositive of the issue with respect to discrimination in the first category, is that it completely ignores the lack of excuse or justification for the difference in treatment of which appellants complain. In other

words, the reports of the Commission give no recognition to the requirement that joint rate arrangements may not be refused one connection on as favorable basis as is provided for another connection unless there is a showing of just cause by reason of a difference in transportation circumstances.

The only excuse offered for withholding joint rate arrangements from appellants is the insistence of the railroad appellees on collecting their full local rate of $2.95 whenever Galveston sulphur destined to Danville is received from a barge line connection at East St. Louis (R. 103, 104, 111). That motive, a desire for maximum revenue in the handling of ex-barge traffic, does not justify the assailed discrimination.

In the early case of *New York & N.R. Co.* v. *New York & N.E. R. Co.*, 3 I.C.R. 542, 4 I.C.C. 702 (1891), Chairman Cooley wrote for the Commission a lengthy and carefully reasoned opinion on the question of what constitutes "discrimination in rates and charges between connecting lines." That case involved joint rates lower than the sum of local rates with one connection, but not with another (3 I.C.R. 547, 4 I.C.C. 715). In holding that such a difference in treatment constituted discrimination within the meaning of the quoted phrase, Chairman Cooley said (3 I.C.R. 550, 4 I.C.C. 721):

> * * * Discrimination occurs when a difference is made between connecting lines similarly situated. A difference founded on actual dissimilarities in the service, or in the convenience of interchange, and adapted to the difference in circumstances, is not discrimination. But a dissimilarity of this nature arises from physical conditions and not from business motives, and the

While $2.95 is charged on sulphur that comes to East St. Louis by barge, the railroad appellees do not demand that amount as compensation for their services on sulphur brought to East St. Louis by rail. As to such sulphur, they demand and receive for their East St. Louis-Danville services something less than $2.95 as a division out of the $9.184 through rate in which they join southwestern rail connections (R. 104). Divisions between rail lines are not generally published. They are the result of private contractual arrangements and the exact amount of the East St. Louis-Danville all-rail division is not known.

The railroad appellees do join Federal and American in a joint barge-rail rate on sulphur from Port Sulphur to Danville. That rate is $6.66 as compared with the joint all-rail rate of $9.184 (Ex. 1, R. 76, 114; R. 77-78). That joint barge-rail rate was published as a specific rate to Danville at the request of the railroad appellees (R. 77), and for their East St. Louis-Danville service the railroad appellees accept a division of $2.26 (R. 83) and do not demand their local rate of $2.95 (Ex. 3, R. 94, 96, 115).

The Danville receiver obtains his sulphur from Galveston, and at the time of the Commission hearing, it was moving via the all-rail route (R. 93). Prior thereto, there had been a barge-rail movement to Danville via a contract water carrier whose rate from Galveston to East St. Louis was $4.65. On that movement the $2.95 local rail rate from East St. Louis to Danville was collected (Ex. 5, R. 101, 117). The receiver at Danville, who controls the routing of his sulphur, uses about 20,000 tons per year (R. 93).

When the sulphur produced at Texas mines is shipped by water, it first must be shipped by rail from

> discrimination made must be no greater than the different conditions will justify.

At the time of that case the Commission had no power to prescribe any rates. Consequently, the order was to cease and desist from the discrimination found.

The desire of the railroad appellees to collect the $2.95 local rate on Galveston sulphur received from barge lines arises from an asserted business motive, the motive of securing the greatest possible income. Presumably, the railroad appellees believe that sulphur will move via the barge-rail route on that rate because it did so move in connection with another barge line some time prior to the hearing herein. Even if that were true, the business motive cannot justify demanding greater revenue in the case of the ex-barge than in the case of the ex-rail traffic. The application of the full combination of locals via the barge-rail route makes that route less able to attract traffic in competition with the all-rail route than if the railroad appellees entered into joint rate arrangements with appellants on a level below the full combination of locals, just as they do with their railroad connections. An adjustment which has the effect of deterring traffic via one route, when there is no transportation reason for the difference in treatment, results in discrimination which is prohibited by Section 3(4). In the *New York & N.R. Co.* case, *supra*, Commissioner Cooley said (3 I.C.R. 550, 4 I.C.C. 720):

> When, therefore, the Statute declares that there shall be no discrimination in rates and charges between connecting lines, it can only mean that no difference or distinction shall be made in rates

the mines to Galveston, unloaded from rail car into bins on the wharves; and subsequently loaded from bins into vessels. The price of sulphur at Galveston is $1.50 in excess of the price at the mines by reason of the expense incurred in such handling (R. 88-89).

At the request of the shipper, the appellants asked the railroad appellees to join them in a joint barge-rail rate on sulphur from Galveston to Danville of $7.67 (R. 78, 91-92). That rate was arrived at by adding the customary difference in barge rates, Galveston over Port Sulphur, of $1.01 to the existing barge-rail rate of $6.66 from Port Sulphur to the same destination (R. 78, 92). While the rail lines blanket New Gulf, Galveston, and Port Sulphur at a common rate of $9.184 to Danville (Ex. 1, R. 76, 114), the barge lines maintain higher rates from Galveston than from Port Sulphur in order to compensate the canal carriers for their haul of 357 miles from Galveston to New Orleans (R. 80). If the $7.67-barge-rail rate were agreed to, appellants intended to propose a $2.26 division for the railroads, that being the same as the rail division out of the Port Sulphur-Danville barge-rail rate, but were prepared to negotiate if the East St. Louis-Danville division of the joint all-rail rate differed from that figure (R. 82-83). The cost of handling to interchange with the railroad appellees at East St. Louis would be borne out of the water-lines' share of the joint rate (R. 84).

If that $1.50 price differential at Galveston were added to appellants' proposed rate of $7.67, the total would be $9.17, or 1.4 cents less than the all-rail rate of $9.184. Appellants must have a substantial differential under the corresponding all-rail rate if

> that shall coerce the public to employ one competitor to the exclusion of another, or deprive one competitor of business that under freedom of selection by the public would be given to it, and thus create a monopoly in favor of another competitor. Unless this effect is given to the language of the Statute it is only a meaningless enactment.

In *Western Pacific R.R. Co.* v. *Southern Pacific R.R. Co.*, 55 I.C.C. 71 (1919), a divided Commission held, as a matter of statutory construction, that a division of a joint all-rail rate was a "rate" or "charge" within the meaning of those words as used in Section 3(4). Because of strong dissents on that point, Commissioner Eastman thought it appropriate to write a concurring opinion in the course of which he said (84):

> * * * However, this is beside the point, for if a carrier refuses without just cause to make a joint fare with one connecting carrier upon as favorable a basis as with another, which is in substance the allegation in this complaint, it is, I believe, discriminating in its joint "rates and charges," contrary to the provisions of the paragraph in question.

The principle stated in the paragraph just quoted has subsequently been followed by the Commission without exception in cases in which railroads comprised both the favored and the disadvantaged connections.

In *Ann Arbor R.R. Co.* v. *B & O R.R. Co.*, 136 I.C.C. 578 (1927), the Commission held that a refusal to join with one rail connection in joint rates lower than a combination of locals while participating therein with others "constitutes a discrimination in rates * * *

and charges between * * * connecting lines" which the Act expressly forbids.

In *Central R.R. Co. of N.J.* v. *N.Y., N.H. & H. R.R. Co.*, 122 I.C.C. 661 (1927), the Commission said (page 673, italics supplied):

> There can be no dispute over the fact that the New Haven deals differently with complainant in the matter of joint rates than it does with the Lehigh Valley and the Pennsylvania. In the one case there is territorial restriction of joint rates via New York Harbor; in the other cases there is none. The question is whether the differentiation is *without just cause* so that it amounts to the discrimination prohibited by the provision of law above quoted [Section 3(4)].

And at page 674:

> In limiting joint rates with the Jersey Central via New York Harbor for the purpose of restricting the amount of traffic moving through that gateway and at the same time making no similar limitation in the case of the Lehigh Valley and the Pennsylvania, defendants have acted *arbitrarily*. We find that the failure of defendants to accord to complainant *like treatment* with the Lehigh Valley and the Pennsylvania in the matter of joint rates via New York Harbor is discriminatory and unlawful.

The most recent case of importance in which the Commission held that the mere fact of refusing joint rate arrangements to one connection while extending them to another under similar conditions results in discrimination in violation of Section 3(4), is *Denver & R. G. W. Co.* v. *Union Pacific R. Co.*, 287 I.C.C. 611, 658, 659, 660 (1953). In that case, after finding as to

the railroads claimed to be guilty of the discrimination that there was no important dissimilarity in transportation conditions surrounding the handling of traffic with the favored connection as compared with the connection excluded from the joint rate arrangements, the Commission at page 660 stated the following conclusion:

> That the maintenance by the Union Pacific and other defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3(4) of the act.

Upon judicial review, in *Union Pacific Railroad Company, et al.* v. *United States, et al.*, 132 F. Supp. 72, 81-82 (1954), a three-judge court sustained the quoted finding and the order based thereon, and said:

> The Commission found there was no important dissimilarity between the transportation conditions in connection with the Bamberger and those in connection with the Rio Grande. Upon this record that factual conclusion may not be disturbed. Section 3(4) clearly prohibits such discrimination.

The case just cited is now pending on appeal in this Court in Nos. 117, 118 and 119. While that case involves discrimination in the first category as defined at the opening of this argument, it does not involve any claim of discrimination in the second category to be dealt with later in this brief.

The instant case is unlike the cases above cited in two respects. First, those cases involved railroads on both sides, whereas here the discrimination is practiced against a barge line connection and in favor of railroads. Secondly, the joint rate required with appellants to cure the discrimination would be below the corresponding joint all-rail rate. The first factual difference is beside the point since by definition Section 3(4) protects common carriers by water subject to Part III of the Interstate Commerce Act, as well as common carriers by railroad.

The second factual difference cannot warrant the action of the Commission in its outright dismissal of the complaint. In *U. S. War Department* v. *A. & S. Ry. Co.*, 92 I.C.C. 528 (1924), Commissioner Eastman wrote a carefully reasoned opinion as to the application of Section 3(4) (then Section 3(3) to a rate situation in which railroads joined each other in joint rate arrangements and refused to establish differential rates with the barge line which is the predecessor of Federal. The rates involved in that case were depressed below a reasonable level so that the Commission had no basis for an order requiring a joint rate arrangement with the barge line as a matter of reasonableness. That meant, if the Commission were to prescribe differential rates, that it must do so by reason of its power to remedy discrimination in rates or charges between connecting carriers. On that point, Commissioner Eastman, speaking for the Commission, at page 546 (italics supplied) said:

> Paragraph (3) of section 3 of the act, however, provides among other things, that all carriers shall afford all reasonable, proper, and equal facilities for the interchange of traffic between

The witness stated on re-direct examination that he was not authorized to say the railroads would be willing to join in any through rates with the barge lines under any terms or conditions (R. 109-110).

Witness George T. Berry, Commerce Agent of the Wabash Railway, was the other witness for railroad appellees. He testified that the Wabash opposed the establishment of a joint barge-rail rate for fear it would have the effect of reducing its present revenue of $2.95 (R. 111), and that in making the all-rail rates to Danville the Wabash did not add its local rate of $2.95 to the rail rate from the Texas mines to East St. Louis (R. 112).

After the hearing, the parties filed briefs and the case was submitted to the Hearing Examiner for a proposed report. The Hearing Examiner ruled in favor of the appellants as to the precise question of law involved in the instant case. His proposed report is Exhibit "B" to plaintiffs' bill of complaint (R. 10-21).

Thereafter the case was submitted on exceptions and reply exceptions to Division 3 of the Commission. Division 3 held, Commissioner Knudson dissenting, that the record afforded "no basis for a finding of unlawful discrimination under section 3(4) of the Act" (R. 27).

Appellants petitioned for reconsideration and oral argument before the entire Commission on the Section 3(4) issue because of the extreme importance of the principles involved.

That petition was granted and such argument was had. During the course of that argument, there was

the following colloquy between counsel for Federal and Commissioner Alldredge (R. 147-148):

> Comm. Alldredge: Are you asking for establishment of joint through rates or simply the removal of discrimination, either that way, or through the establishment of proportional rail rates?
>
> Mr. Belnap: No, we are asking for joint through rates, and urge you that that is the necessary step to remove the discrimination demonstrated.
>
> Comm. Alldredge: If the Commission required the railroads to establish beyond East St. Louis a proportional rate—
>
> Mr. Belnap: Equivalent to their division, that would be one method of curing the thing about which we complain but that isn't the relief we have asked. I don't believe that is really one of the issues of our complaint because our complaint asks for through, joint through rates to cure the discrimination.
>
> Now, on this point—
>
> Commr. Alldredge: You haven't got any general prayer for relief?
>
> Mr. Belnap: Yes, we have asked for such other relief as may seem proper . . .

And also the following colloquy between counsel for Federal and Commissioner Knudson (R. 150):

> Mr. Knudson: You say you rely, Mr. Belnap, exclusively on Section 3(4). Do you mean that the other considerations, some of which were set forth at least in the dissent in the primary case, should be brushed aside now?
>
> Mr. Belnap: No, sir.
>
> Let me say it this way: From the standpoint of the barge lines, we wanted very much to have a completely reasoned opinion from the Commission

Sulphur via East St. Louis to destinations on the line of the railroad appellees which was established at their request (R. 77). To say that there is *no* evidence to afford a basis for a conclusion as to a non-discriminatory barge-rail joint rate is simply not true. Consequently, if the finding referred to is considered to be a finding of fact, then the order should be set aside on the ground that the premise on which it is based is completely contrary to the evidence. Appellants doubt that the Commission intended the finding as one of fact. The report when considered as a whole, clearly portrays a belief on the part of the Commission that the difference in treatment complained of by appellants is not, as a matter of law, within the purview of Section 3(4). If the Court rules that the Commission is wrong, the case must be remanded with directions to the Commission to proceed to a decision upon a correct construction of the statute.

The depressed character of the rail rates affords no justification for the discrimination practiced against plaintiff

In its denial to appellants of the relief sought, the Commission relied in part upon its conclusion that when joint all-rail rates are depressed to meet barge competition, the obligation no longer exists to treat barge line connections as favorably as rail connections. On this point the following appears in the report of Division 3 (R. 27).

> In reaching our conclusions herein we are not unmindful of the provisions of the national transportation policy, which call for a fair and impartial regulation of all modes of transportation subject to the act, so administered as to recognize and preserve the inherent advantages of each. We do not believe, however, that this policy requires us

on this interpretation of Section 3(4), particularly as applied to a situation of this kind. We thought we could achieve that best by confining our petition and our argument to that point.

Following such argument the Commission issued its report on reconsideration, Commissioners Knudson, Mahaffie, and Alldredge dissenting (R. 29-35). In that report, which is the subject of this action, it held that the difference in treatment complained of by appellants does not, as a matter of law, come within the purview of Section 3(4).

Upon the dismissal of their complaint by the Commission, the appellants brought the present action in the United States District Court for the Southern District of Texas against the United States and the Interstate Commerce Commission to set aside the Commission's order (R. 3-10). The railroads which were the defendants before the Commission intervened as defendants (R. 38-41). American Waterways Operators, Inc., an intervener before the Commission in support of complainants, also intervened in the lower court (R. 41-44). Printed briefs were filed. Appellants in their brief challenged the Commission's order primarily on the ground of an alleged misconstruction of Section 3(4) as applied to the facts of record.[7] The District Court, three judges sitting (Hutcheson, Chief Circuit Judge, Connally, and Kennerly, District Judges), dismissed appellants' complaint and handed down a written opinion (R. 45-55). Judgment for the defendants was

[7] Those briefs are not a part of the record. The fact is stated in appellant's motion for new trial and to amend findings of fact and conclusions of law (R. 57.)

to force rail carriers, where they maintain a depressed rate to meet water competition, to further depress their earnings on the traffic in order to favor that same form of competition. Danville is 184 miles from the end of the barge-line service, and the rail rate for that 184-mile haul is depressed at least from 13.5 to 9.2 percent of first class. If the barge lines can reasonably be expected to participate in this movement, the opportunity to do so should be afforded, not by the establishment of a through barge-rail rate differentially under an all-rail adjustment which is already severely depressed, but by a reduction in the barge rate from Galveston to East St. Louis or by an increase in the depressed rail rate, or both. There is no allegation here that the all-rail rate, or any factor thereof, is unreasonably low.

The concept of discrimination bears no relationship to the absolute level of the charges in question. A rate or charge may be reasonable and at the same time discriminatory.

Appellants do not contend here that the $2.95 local rate demanded by defendants on traffic brought from Galveston to East St. Louis by water is unreasonable. Whether it is or is not reasonable is wholly immaterial to the issue of discrimination, which is the principal issue involved in this review. It has been long established that a rate, fare, or charge need not be unreasonable in order to create a discrimination in violation of the statute. In an early case, *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad Company*, 145 U.S. 263, 277 (1892), the Court said:

> We agree, however, with the plaintiff in its contention that a charge may be perfectly reasonable under section 1, and yet may create an unjust dis-

entered on February 16, 1955 (R. 55-56). The written opinion of the lower court did not deal specifically with the question of statutory interpretation and application which appellants sought to have determined by their suit.

As to the Commission's ruling on the issue under Section 3(4), the lower court said (R. 52):

> When the whole record is considered in the light of all the provisions of the Act and many cases construing same, we think plaintiffs have not shown their claim of discrimination to be meritorious.

Near the end of the opinion, the lower court said (R. 54):

> Neither have plaintiffs shown that the existing rates discriminate against them.

The lower court did not enter findings of fact and conclusions of law apart from its written opinion. The statements quoted above from the opinion appear to be findings of fact. However, the lower court did not note the principal fact on which appellants rely, that is, the acceptance by railroad appellees of a division lower than their local rate when the sulphur is received from a railroad connection, whereas, when received from a water carrier connection, the higher local rate is demanded. The opinion reads as if the lower court were unaware of this difference in treatment and of the question of statutory construction on which the Commission turned its decision. Nor did the lower court appear conscious of the fact that the railroad appellees refuse to treat appellants as favorably as they treat their rail connections in the

lation of the through rates to the combination of locals via the respective routes under consideration. It also ignores the fact that the slower and cheaper service via barge is reflected in barge rates on sulphur lower than all-rail rates for corresponding hauls. For example, the rate on sulphur from Galveston to East St. Louis is $5.32 via barge and $8.736 via rail. From one origin this difference is reflected in joint through rates. For example, from Port Sulphur via East St. Louis to Danville, the joint barge rail rate is $6.66 as compared with $9.184 via all-rail. The Commission had evidence, but chose to dismiss on the legal theory that Section 3(4) did not apply.

III. The Commission found that the joint all-rail rate from Texas to Danville, as well as the local rail rate from East St. Louis to Danville, was depressed below a normal level to meet water competition. That circumstance is held by the Commission to warrant the refusal of the railroad appellees to participate in joint rate arrangements with appellants. Whether a charge or a rate factor is reasonable or not is beside the point when discrimination is involved. Equality of treatment of all connecting lines necessary to avoid a Section 3(4) violation must be practiced whether the rates involved are normal rates or depressed rates. *American Express Co.* v. *South Dakota, ex rel. Caldwell,* 244 U. S. 617 (1916).

IV. The Commission ruled, as a matter of statutory construction, that discrimination which results when a full local rate is demanded from a connecting barge line and a lower division of a joint through rate is accepted as compensation for the same service from a connecting railroad, is not prohibited by Section 3(4). The Commission's theory is that a division of a joint

ate is not a "rate" or "charge" within the meaning of those terms in Section 3(4). On that theory, it dismissed appellants' complaint. The Commission agreed that a difference in divisions without just cause would be discriminatory and that a difference in separately established reshipping rates without just cause would be discriminatory. The Commission erred in making the discrimination prohibited by Section 3(4) dependent on form, rather than substance. The legislative history of the Interstate Commerce Act shows that Congress intended thereby to prohibit every discriminatory act or practice which it had authority to reach. *Houston, E. & W. T. R. Co.* v. *United States*, 234 U. S. 342 (1914). The Interstate Commerce Act requires the destruction of all discriminatory practices, whatever their form. *Union Pacific R. Co.* v. *United States*, 313 U. S. 450 (1941). Until the instant case the Commission held that a division was a rate or charge within the meaning of Section 3(4), *Western Pacific R. R.* v. *Southern Pacific Co.*, 55 I.C.C. 71 (1919). In the case of reshipments of grain from Chicago to the East, the effect of the decision of this Court in *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567 (1947), was to require the publication and maintenance of reshipping rates from Chicago on ex-barge grain originating in Illinois identical with the divisions of through all-rail rates which eastern railroads accept out of joint all-rail rates on ex-rail reshipments from Chicago which come from the same origin territory. That application of Section 3(4) required divisions to be treated as "rates" or "charges" within the meaning of that section.

V. The order of the Commission should be set aside because it rests on a mistake of law in construing the

which the service is rendered under the same circumstances and conditions, unlawful results follow." The Commission there found, at page 73, that "The expression of rates and charges in the form of divisions makes them nonetheless rates and charges which may be discriminatory." That finding was a necessary preliminary to the conclusion therein reached that complainant was being discriminated against by defendants in the matter of divisions of joint rates, in violation of provisions of the act similar to those now in Section 3(4). If divisions of joint rates were a "charge" under the law as it stood then, they must be a "charge" under the law as it stands today.

To my mind it is obvious that the complaining barge lines are being subjected to unlawful discrimination in and to the extent that the defendants operating from East St. Louis to Danville make a greater charge as compensation for their services when the transportation of this sulphur is by barge from Galveston to East St. Louis than they receive for such services when the transportation is by rail from New Gulf to East St. Louis.

In my separate expression in connection with the prior report herein, I dissented also from the finding there made, and here affirmed, that the establishment of a joint barge-rail rate on this traffic was not shown to be necessary or desirable in the public interest. I am now satisfied that such a finding would not be needed if the relief which I would accord under section 3(4) of the act were granted.

Discrimination is to be tested by matters of substance, not matters of form. In *New York* v. *United States,* 331 U.S. 284, 296 (1947), this Court said (italics ours):

> The principal evil at which the Interstate Commerce Act was aimed was discrimination *in its various manifestations.*

There, the Court cited *Louisville & N. R. Co.* v. *United States,* 282 U.S. 740, 749 (1931), where it said:

> The legislative history of the Interstate Commerce Act shows clearly that the evil of discrimination was the principal thing aimed at. Senate Report No. 46, 49th Cong., 1st sess., p. 215. See *Kansas City S. R. Co.* v. *C. H. Albers Commission Co.,* 223 U.S. 573, 597.

In the *Shreveport* case (*Houston, E. & W. T. R. Co.* v. *United States,* 234 U.S. 342, 356 (1914), the Court said (italics ours):

> It is apparent from the legislative history of the act that the evil of discrimination was the principal thing aimed at, and there is no basis for the contention that Congress intended to exempt *any discriminatory action or practice* of interstate carriers affecting interstate commerce *which it had authority to reach.*

In *Union Pacific R. Co.* v. *United States,* 313 U.S. 450, 461-462 (1941), the Court took note of the fact that the Interstate Commerce Act had been construed as effective "to accomplish the destruction of discriminatory practices, *whatever their form.*"

The Interstate Commerce Act reflects a clear intent of Congress to embrace within the statutory prohibitions all discriminations which it is within its power to condemn. There can be no more vicious and hurtful discrimination against a connecting carrier than that of the type practiced by the railroad appellees in the instant case.

their respective lines and that they "shall not discriminate in their rates, fares, and charges between such connecting lines." It follows, therefore, that where the rail lines to and from the ports of interchange with the barge line participate with rail lines, operating between such ports, in through all-rail routes and joint rates from and to the points covered by the barge line's petition, we have power, not only to require the establishment of through routes in connection with the barge line, but also to prescribe joint rail-barge-rail rates *which will be nondiscriminatory,* under the above provision of the act, as compared with the corresponding point all-rail rates.

That such a power is desirable in the public interest seems clear, for a water carrier like the barge line must be able to secure traffic to and from interior points if it is to prosper, and in the case of the barge line, with its slow and inferior service, such traffic can not be secured without resort to differential rates. While this does not answer the question as to whether the power exists, it does throw light upon that question. The service rendered by the barge line in connection with the through traffic in question is not the same as the service performed by an intermediate rail carrier between the same points, being both slower and cheaper. In view of this difference in cost and value, the portion of the rail-barge-rail joint rate applicable to barge-line service may reasonably be less than the corresponding portion of the all-rail joint rate applicable to intermediate rail service. It follows from this *that in determining what is necessary in order that discrimination may be avoided,* we may require the rail lines which form part of both routes to join in a lower rate over the rail-barge-rail route.

This Court can deal only with the power and duty of the Commission. It should set aside the Commis-

sion's order dismissing the complaint only if that order is based on a misapprehension by the Commission as to the scope of Section 3(4). If that is found, the case should be remanded to the Commission for further proceedings consistent with the opinion of the Court.

It may be argued that the finding from the report on reconsideration quoted at the beginning of this section of the brief as to the lack of evidence is a finding of fact to which the doctrine of administrative finality applies. But the record shows that there was evidence as to rates and rate relations on which could be determined what joint rate arrangements are required to treat appellants as favorably as the railroad appellees treat their southwest rail connections. Such evidence includes the relation of the barge rates to the rail rates from Galveston to point of interchange. Those barge rates are substantially lower than the corresponding all-rail rates because barge transportation is low-cost transportation. The Commission in its report on reconsideration, based on a study of barge line costs relied upon by appellants, notes that the total cost for moving sulphur by barge from Galveston to East St. Louis and delivering it to the railroad appellees at that point for movement to Danville is $4.32 (R. 33). In comparison, the rail rate from Galveston and Texas sulphur mines to East St. Louis is $8.736 (Ex. 1, R. 76, 114). Such evidence also includes the shrink below the combination of locals which results from the railroad appellees' participation in the all-rail joint rate adjustment. As is noted in the Statement, that shrink amounts to $2.502. Such evidence also includes the joint barge-rail rate of $6.66 (as compared with $9.184 via all-rail) from Port

> crimination or an unreasonable preference under sections 2 and 3.

See also *American Express Co.* v. *South Dakota ex rel. Caldwell*, 244 U.S. 617, 624 (1916), where the Court said (italics ours):

> Both rates may lie within the zone of reasonableness and yet involve unjust discrimination.

and

> Proceedings to remove unjust discrimination are aimed directly *only* at the *relation of rates.*

The Commission none-the-less notes and seems to rely on the fact that the $2.95 local rate from East St. Louis and Danville is "depressed." (R. 27, 32-33). Certainly it is not depressed to meet any competition from appellants since they are unable to reach that point. In any event, regardless of the asserted depressed character of the local rate, it is an admitted fact that even lower charges are accepted by the railroad appellees in connection with all-rail traffic for the performance of a similar service. Such discrimination is neither explained nor excused by the fact that the charges demanded from plaintiffs may not be on a "maximum reasonable" basis.

Discrimination prohibited by Section 3(4) results when a railroad demands its full local rate on sulphur received from a barge line connection, while accepting as compensation for the same service a lesser amount, in the form of a division when the sulphur is received from a railroad connection under a joint rate arrangement

That discrimination in fact exists when a carrier accepts less for identical service performed on traffic received from one connection than when it is received from another, is apparent. That it exists under

the circumstances of this case is established beyond question, and is recognized by the Commission. That agency's failure to condemn it here is because of its conclusion that in the form practiced it does not, as a matter of law, fall within the prohibition of Section 3(4). This is made plain by the following statement from the report on reconsideration (R. 31):

> The claim here is, not that the complainants are discriminated against in the matter of divisions of joint rates, as was the case in *Western Pacific R. Co.* v. *Southern Pac. Co.*, 55 I.C.C. 71, referred to by the complainants, nor that the separately established rate paid by the shipper as one of the components of a combination rate is greater for the transportation of ex-barge traffic than for ex-rail traffic, which was the situation in *Interstate Commerce Commission* v. *Mechling*; 330 U.S. 567, also cited by the complainants, but that the separately established rate paid by the shipper on ex-barge traffic beyond East St. Louis is greater than the unpublished division of a joint through all-rail rate received by the rail carriers for the transportation beyond East St. Louis on ex-rail traffic moving from the same origin to the same destination. The comparison is between a rate or charge paid by a shipper and a division of a joint rate received by rail carriers, and is of unlike things. Basically divisions of joint rates are the result of contractual arrangements between carriers; they are not 'rates' or 'charges' as those terms are used in section 3(4) of the act. A seemingly contrary opinion expressed in *Western Pacific R. Co. v. Southern Pac. Co., supra,* upon which the complainants rely, was made, as above indicated, under circumstances different from those now before us, and is not controlling here.

In that conclusion the Commission erred, basically, in making the discrimination prohibited by the statute dependent upon its form rather than its substance. In essence the Commission holds that while the law prohibits a discrimination between connecting lines accomplished through differing divisions of joint through rates, and also prohibits discrimination between connecting lines accomplished through different proportional or reshipping rates, it does not prohibit such discrimination if it is accomplished by the device of a division on the one hand and a separately published rate on the other. There exists no reasonable basis in fact or in law for such distinction. This is recognized in the reasoned dissenting opinion of Commissioner Knudson, concurred in by Commissioners Mahaffie and Alldredge (R. 33):[8]

> I am in disagreement with the conclusion reached on the issue under Section 3(4) of the Act. The complaining barge lines are willing to absorb the charge for the transfer of the sulphur from the barge to the rails at East St. Louis, and there is here no serious contention that in other respects the circumstances affecting the transportation from East St. Louis to Danville are any different for the ex-barge than for the ex-rail traffic. It is true that the record fails to show the division of the joint all-rail rate received by the East St. Louis-Danville defendants, but it is evident that the division is less than the local rate from East St. Louis to Danville, which local rate must be paid by the shipper on this ex-barge traffic.

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[8] Quotation is from official I.C.C. report, 291 I.C.C. 422 (425), which varies slightly in phraseology from earlier mimeographed opinion attached to complaint and reproduced in the Record as an appendix thereto.

In *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, the Supreme Court held that the provisions of section 3(4) as applied to the facts in that case meant "that Chicago-to-the-east railroads cannot lawfully charge more for carrying ex-barge than for carring ex-lake or ex-rail grains to and from the same localities, unless the eastern haul of the ex-barge grain costs the eastern railroads more to haul than does ex-rail or ex-lake grain." Although on all-rail traffic the amount received by the East St. Louis-Danville lines is a division of the through charge, nevertheless it seems to me that the principle stated by the Supreme Court has application. The cause for complaint lies in the fact that these lines demand the rate of $2.95 per long ton applying from East St. Louis locally to Danville on traffic originating at New Gulf that may move from Galveston to East St. Louis by barge, although they receive a division, which it must be assumed is less than $2.95, of the joint all-rail rate on traffic for the same destination moving from New Gulf to East St. Louis by rail. Such a difference between the amounts received or demanded for the transportation beyond East St. Louis could have justification only if a substantial difference in the amount or character of the service beyond East St. Louis were shown. No such a showing has here been made. The evidence is to the contrary.

Section 3(4) of the act, among other things, prohibits carriers subject to part I of the act from discriminating "in their rates, fares, and charges between connecting lines," and the term "connecting lines" is therein defined as including common carriers by water subject to Part III of the act. Complainants here are such common carriers. As stated in *Western Pacific R. Co.* v. *Southern Pac. Co.*, 55 I.C.C. 71, 81, "Wherever and whenever the discrimination is practiced as between carriers and connections in cases with respect to

The basic provisions now found in section 3(4) date from the original Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 380. Originally it was the second paragraph (unnumbered) of Section 3. In the Transportation Act of February 28, 1920, c. 91, Section 405, 41 Stat. 479, the paragraph was given the number (3). It was again renumbered as (4) in the Interstate Commerce Act of September 18, 1940, Section 5(e) c. 722, Title I, 54 Stat. 902. At that time, when Part III bringing carriers by water under regulation was also enacted, Congress added to Section 3(4) the definition that "connecting line" embraces "any common carrier by water subject to Part III."

Heretofore, in the few cases in which the question has been raised, both the Commission and the Courts have proceeded upon the premise that divisions are "rates" or "charges" within the meaning of that section.

In *Western Pacific RR. Co.* v. *Southern Pacific Co.*, 55 I.C.C. 71 (1919) cited and relied upon both in the proposed report of the Hearing Examiner and in the dissenting opinion of Commissioner Knudson, the Commission ruled as a *matter of law* that the paragraph made unlawful an unjustified difference in the matter of divisions of joint rates as between different connecting lines. In order to appreciate the full significance of the holding in that case, it is necessary to note the state of the statutory law when that complaint was brought and disposed of. The Act did not treat by specific name with divisions of joint rates as a subject of separate regulation prior to the enactment of Section 15(6) in the Transportation Act

of February 28, 1920, c. 91, Section 418, 41 Stat. 486.[9] Prior thereto, the Act gave the Commission power over divisions by that name only as to the reasonableness thereof in connection with the joint rates being divided,

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[9] Section 15(6) (49 U.S.C. § 15(6) reads as follows:

(6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

rather than from the standpoint of relations between connecting carriers.

Section 15(6) gave to the Commission, apart from its power to fix joint rates, power to prescribe "just, reasonable and equitable divisions" of revenue between participating carriers upon giving due consideration to various specified factors. Since Section 15(6) was not a part of the Act at the time the *Western Pacific* case was brought, the complaint was based solely on Section 3 of the Act. The prime question in that case was whether a division of a joint rate is a rate or charge within the meaning of what was then the second paragraph of Section 3. Unless it was, the Commission was wholly without jurisdiction of the case. Under such circumstances, the holding on page 73 of the *Western Pacific* case that

> The expression of rates and charges in the form of divisions makes them nonetheless rates and charges which may be discriminatory.

has a significance which is in nowise dependent on the circumstances of the particular case. The holding was one of law on a question of jurisdiction. The Commission's effort here to distinguish that case on the ground that the scope of the statute was determined "under circumstances different from those now before us" must fail.

Appellants appreciate that inconsistency on the part of the Commission in deciding questions involving administrative discretion affords no ground for challenging a Commission order. Plainly, however, that rule cannot apply when the question presented is purely one of law, i.e., the construction of a statute and the jurisdiction of the Commission. No element of ad-

ministrative discretion is involved in such a ruling. If the meaning and application which the Commission gave to Section 3 in 1919 was right, that must be the meaning and application of the unchanged provision in the statute, regardless of the circumstances under which the question of Section 3(4) jurisdiction is raised. The construction given the statute in 1919 has been impliedly sanctioned by Congress in twice re-enacting the statute (Transportation Act of February 28, 1920, *supra*, and Act of September 18, 1940, *supra*) without alteration or limitation in the particulars construed. See *New York, N. H. & H. R. Co.* v. *Interstate Com. Commission*, 200 U.S. 361, 401-402 (1906).

Other cases in which the Commission has dealt directly with a division as a vehicle of discrimination are: *Rates on Railroad Fuel and Other Coal*, 36 I.C.C. 1 (1915), and *The Tap Line Case*, 31 I.C.C. 490 (1914). In both of these Commission cases, reliance was placed upon *The Tap Line* cases (*United States* v. *Louisiana & P.R. Co.*), 234 U.S. 1, 28 (1914). The Supreme Court there stated with respect to the Commission's authority to deal with discrimination accomplished *by means of divisions* (italics supplied):

> * * * That body has the authority, and it is its duty, to reach *all unlawful discriminatory practices* resulting in favoritism and unfair advantages to particular shippers *or carriers*.

In *Interstate Commerce Commission* v. *Baltimore & O. R. Co.*, 225 U.S. 326 (1912) at pages 344-345, this Court noted the power of the Commission to prevent railroads from evading an order dealing with rates on railway fuel by the device of establishing divisions of joint rates in lieu of the separately established rates on railway fuel which had been condemned as dis-

criminatory. In *Rates on Railroad Fuel and Other Coal*, 36 I.C.C. 1, 11-15 (1915), the Commission exercised its power to prevent that evasion.

An admitted discrimination cannot be allowed to escape a condemnation couched in general terms solely by virtue of the label attached to the vehicle chosen by those who would prefer one connection to another. Webster defines a charge as "the price demanded for a thing or service" (Webster's New International Dictionary, 2nd Edition, 1941). The regulatory purpose is defeated by ascribing an artificially restrictive definition to that term as employed by Congress in remedial legislation. The immediate and obvious result of such a narrow construction is to produce a "loophole" for the use and benefit of those seeking to avoid the purpose and intent of the Act.

Those who defend the Commission's action in this case undoubtedly will advance diverse arguments tending to demonstrate the peculiar characteristics of a division. They will assert that Section 15(6) of the Act sets out numerous factors to be considered by the Commission in fixing divisions[10] and further that such considerations lawfully could result in different divisions for the same services upon competitive traffic. To say that these definitive characteristics of a division serve to immunize it from Section 3(4) is a pure *non sequitur*. The Interstate Commerce Act must be construed harmoniously so as to give effect to each of its provisions. Individual sections may not be isolated and administered in a vacuum. True, the Commission is empowered by Section 15(6) upon proper findings to fix divisions which may conceivably vary as be-

[10] This section is quoted in full in footnote 9 on page 41 above.

tween different carrier connections for similar services via the same gateway between the same points, provided there are differences with respect to the criteria stated in Section 15(6). Patently, differing divisions so fixed are not prohibited by Section 3(4). In this proceeding, however, we do not reach that question. The railroad appellees, with the Commission's approval, simply refuse to interchange traffic with appellants under *any* basis of joint rates, insisting instead upon their full local rate. The lower charges assessed upon traffic interchanged with favored rail connections are said to be permissible, not because justifiable by reason of differences in factors specified in Section 15(6), but because without the scope of the Commission's power to cure.

No amount of elaboration upon the distinctions between a rate and a division can alter one whit the plain fact that a division in the normal and usual sense is the charge ("the price demanded for a thing or service") which the carrier recipient accepts for the performance of its transportation services. It obviously is a different *form* of charge than a published point-to-point rate. As between shipper and carrier, it cannot be considered a charge since it is not the price demanded *from the shipper* for a service performed, the shipper being unconcerned with the *apportionment* of the only charge to him, i.e., the through rate. It is also true that the level of a division may be determined, at least in part, by factors not apposite to the construction of published rates. Such factors, however, certainly do not include the only circumstance relied upon by railroad appellees for a difference in their charges, i.e., the nature (whether water or rail) of the inbound transportation agency. The ability of a con-

necting carrier to participate in through transportation is largely dependent on the compensation demanded by the lines with which he connects. He is affected just as much when the compensation demanded from his competitior is in the form of a division which is lower than the local rate demanded from him as he would be if either different divisions or different proportional rates were exacted from him and his competitor.

This is illustrated by the rate structure which was involved in *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 (1947), in which the Court reviewed the order entered by the Commission in *Grain Proportionals, Ex-barge to Official Territory*, 262 I.C.C. 7 (1945).

In that case the Commission had approved, as to grain reshipped from Chicago which originated west of the Mississippi River, higher proportional rates to eastern destinations when the grain arrived at Chicago by barge than when the grain arrived at Chicago by rail. The Commission also had approved those same proportional rates on ex-barge grain originating at points in Illinois. Such ex-barge proportionals were higher than the divisions which the eastern railroads accepted out of joint all-rail rates on grain from the same origins. The Supreme Court sustained the decree of the District Court which set aside that approval by the Commission. The decree so affirmed enjoined the Commission's order insofar as that order

> Prescribes, approves, authorizes, or countenances *in any manner whatever* a charge for railroad services in transporting east from Chicago grain that has arrived there by barge that is higher than any rate or charge that is contem-

> poraneously exacted *in any form or under any guise* for railroad services which do not appear from legally relevant findings of the Commission supported by evidence to be substantially different from railroad services in transporting east from Chicago like ex-rail grain *from like origins* west of Chicago. (Italics supplied.)

In its brief to this Court in that case, the Commission took the position that the proportional rates of eastern railroads on ex-rail grain from origins west of the Mississippi River had the same status as the divisions of the eastern lines out of the joint all-rail rates from Illinois origins. At pages 40-41 of its brief the Commission said:

> Consequently there is no distinction to be made in fact between the charges for transportation from Chicago to the East accruing to the eastern carrier whether they be obtained in the form of a separately established proportional rate or as a division of the joint through rate.

On that premise the Commission contended that the disparity in charges on ex-barge versus ex-rail grain from Chicago to the East was not in violation of Section 3(4) because both the proportional rates and the divisions in the case of ex-rail grain were simply parts of through rates and the lawfulness of the relationship should be tested only from the through rate standpoint.

At page 42 in its brief the Commission said:

> A division of a joint rate is not a proper standard by which to test the lawfulness of separately established rates.

In its decision, the Court did not find it necessary to pass in specific terms upon that contention. However,

the facts in the case before it, the breadth of the decree affirmed, and the condemnation in the opinion of "discriminations . . . accomplished by through rates" make plain that it considered a difference between a division on all-rail grain and a higher proportional on ex-barge grain to be embraced by and offensive to the prohibition against discrimination in Section 3(4) to the same extent as when the difference is between two separately established proportional rates.

In striking down the order of the Commission, the Court said, at page 577 (italics supplied):

> The foregoing provisions flatly forbid the Commission to approve barge rates or barge-rail rates which do not preserve intact the inherent advantages of cheaper water transportation, but discriminate against water carriers and the goods they transport. Concretely, the provisions mean in this case that Chicago-to-the-east railroads cannot lawfully charge more for carrying ex-barge than for carrying ex-lake or ex-rail grains to and from the same localities, unless the eastern haul of the ex-barge grain costs the eastern railroads more to haul than does ex-rail or ex-lake grain. And Sec. 307(d), authorizing the Commission to fix differentials as between through water-rail and through all-rail rates, does not authorize the Commission to neutralize the effective prohibitions of the other provisions *which were strengthened in 1940 expressly to prevent a discrimination against water carriers.*
>
> The basic error of the Commission here is that it seemed to act on the assumption that the congressional prohibitions of railroad rate discriminations against water carriers were not applicable to such discriminations *if accomplished by through rates. But this assumption would permit the destruction or curtailment of the advantages to shippers of*

cheap barge transportation whenever the transported goods were carried beyond the end of the barge line. This case proves that. * * *

The *Mechling* case stands clearly for the proposition that either a disparity in separately established proportionals, or a disparity between a division of an all-rail rate and a separately published rate applied on the reshipment of barge-arrived traffic, constitutes the type of discrimination which is prohibited by Section 3(4). If that were not the law the railroads could circumvent with impunity the clear intent of the statute as interpreted in the *Mechling* case by the mere device of publishing all-rail joint rates, manipulating their divisions to less than their local rate basis, and simply refusing to enter into similar arrangements with their water carrier connections, as the railroad appellees have done in this case.

The error of the Commission is one of law

In reviewing the report and order of the Commission in the instant case, the Court is not called upon to do more than find that the Commission erred as a matter of law in concluding that the undisputed difference in treatment as between appellants and connecting southwestern railroads constitutes discrimination of the type prohibited by Section 3(4). The failure of the Commission to take jurisdiction and require correction is not a matter of administrative judgment or a question of fact and thus beyond the scope of judicial review. See *Mitchell* v. *United States*, 313 U.S. 80, 97 (1941), wherein the Court, in setting aside an order of the Commission and remanding the cause for further proceedings in conformity with its opinion, said:

> * * * It is enough that the discrimination shown was palpably unjust and forbidden by the Act.

A decision of an administrative body which rests directly on a mistake of law in construing the statute is void and must be set aside. *United States* v. *Missouri P. R. Co.*, 278 U.S. 269 (1929.)

Commission orders have been condemned wherever based upon findings of fact which were not relevant as a matter of law. *Southern P. Co.* v. *Interstate Commerce Commission*, 219 U.S. 433 (1911); *Ann Arbor R. Co.* v. *United States*, 281 U.S. 658, 666 (1930). The same principle applies conversely where the Commission fails to consider facts which are relevant as a matter of law. *Interstate Commerce Commission* v. *Alabama M. R. Co.*, 168 U.S. 144 (1897); *American Trucking Asso.* v. *United States*, 326 U.S. 77 (1945). An order should be set aside when not supported by adequate findings and when the findings entered provide no rational basis for the ultimate conclusion. *United States* v. *Baltimore & O. R. Co.*, 293 U.S. 454 (1935); *United States* v. *Carolina F. Carriers Corp.*, 315 U.S. 475 (1942); *Eastern-Central M.C. Asso.* v. *United States*, 321 U.S. 194 (1944). An order which shows an abuse of discretion should be set aside. *Mitchell* v. *United States*, 313 U.S. 80 (1941); *Southern P. Co.* v. *Interstate Commerce Co.*, 219 U.S. 433 (1911).

CONCLUSION

The outstanding fact in this proceeding is that the rail carrier appellees impose upon traffic received from common carrier barge line connections a higher charge than they impose upon the same traffic, received under the same circumstances and conditions from their favored rail connections.

In effect, the Commission has held in its decision here under review that such discrimination is unlawful if it is accomplished by giving one connection a preferential division as compared with the division given another (*Western Pacific* case), that the discrimination is similarly unlawful if accomplished by giving one connection a preferential proportional (or local) rate as compared with the rate given another (*Mechling* case), but that if the discrimination is accomplished by giving the favored connection a preferential division under a joint rate agreement while refusing to afford such an agreement to another, and insisting that the traffic of the less-favored connection be subjected to a higher proportional or local charge for exactly the same service, then the prohibition of Section 3(4) does not apply and the Commission is powerless to order the discrimination removed.

Appellants submit that the Commission has misconstrued the statute and misconceived its power and duty thereunder; that under the plain words of the statute, as applied by the Supreme Court in the *Mechling* case, the mere device of employing a division versus a published rate as the instrument of discrimination does not give it insulation against the condemnation and prohibition clearly intended and provided by the Congress. Accordingly, the decree below should be reversed, this case remanded to the District Court so that the order of the Commission under review may be enjoined, set aside and annulled, and the case

remanded to the Commission for a report therein which will proceed upon a proper construction of Section 3(4).

Respectfully submitted,

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Proof of Service

In compliance with the applicable provisions of the Revised Rules of the Supreme Court of the United States, I, Francis W. McInerny, one of the attorneys for the several appellants on whose behalf the foregoing brief is submitted, and a Member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing doc-

ument on counsel for the several parties to this proceeding, as follows:

1. On the United States of America by mailing copies in duly addressed envelopes with first class postage prepaid to:

Honorable Simon E. Sobeloff
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

2. On the Interstate Commerce Commission by mailing copies in duly addressed envelopes with first-class postage prepaid to

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3. On the New York Central Railroad Company, Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad Company, and Wabash Railroad Company, by mailing copies in duly addressed envelopes with air-mail postage prepaid to

John A. Daily, Esquire
1225 La Salle Street Station
Chicago 5, Illinois

This, the 27th day of January, 1956.

FRANCIS W. McINERNY

IN THE

Supreme Court of the United States

October Term, 1955

No. 233

DIXIE CARRIERS, INC., COYLE LINES INCORPORATED, AMERICAN BARGE LINE COMPANY, FEDERAL BARGE LINES, INC., *Appellants,*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL., *Appellees.*

On Appeal from the United States District Court for the Southern District of Texas

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IN THE

Supreme Court of the United States

October Term, 1955

No. 233

DIXIE CARRIERS, INC., COYLE LINES INCORPORATED, AMERICAN BARGE LINE COMPANY, FEDERAL BARGE LINES, INC., *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL., *Appellees*.

On Appeal from the United States District Court for the Southern District of Texas

REPLY BRIEF FOR APPELLANTS

STATEMENT

The questions presented by this appeal, the facts of record relevant thereto, and the argument in support of the position taken by the barge line appellants with respect to those questions, are all fairly stated and fully developed in our brief in chief. That brief supplies all reply necessary to most of what appellees say in their briefs (one by the railroad appellees hereinafter referenced "RR", and one by the Interstate Commerce Commission, hereinafter referenced "ICC") on the merits of the involved questions of law and statutory construction. However, some errors

in premises not readily apparent and certain inconsistencies and inaccuracies in legal theories on the part of appellees warrant further brief attention.

I.

The Section 3(4) Issues Based Both on the Differences in Through Route and Joint Rate Arrangements and on the Local Rate as Compared With Less Compensation for the Same Services in the Form of an All-Rail Division, Have Been Pressed by Appellants at All Stages of the Proceeding From the Filing of the Complaint With the Commission (R. 62)

Appellees contend over and over again in their briefs that the section 3(4) issues stated in the heading were not raised by the complaint to the Commission or, if raised, were waived at the oral argument. (ICC 11, 17-18, 31, 52, 53-54; RR 4, 5, 9-11, 13, 16, 30-32). More effort, by far, is expended in urging the Court *not* to rule on the question of whether a division under the circumstances of this case is a "rate" or a "charge" within the meaning of section 3(4), than in assisting the Court to come to a sound conclusion on the merits of that question.[1]

By way of reply, it is perhaps sufficient to point out that the Commission treated the issues as properly before it and rested its dismissal of appellants' complaint on a construction of the statute which was challenged in the lower court [R. 58, paragraph 1(b)], and is challenged in this Court. A reviewing court

[1] In the Commission's brief of 65 pages only pages 52 to 62, and in the railroad brief of 38 pages only pages 32 and 33, deal with the merits of the question.

will test the validity of an order of an administrative agency by the grounds on which it is based. *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U.S. 80, 87 (1942).

Furthermore, the issues as stated in the above heading were argued on the merits before the Commission by counsel for appellants (R. 121, 123, 124-126, 126-129, 132-133) and also by counsel for the railroad appellees (R. 143). At no stage of the proceeding did the railroad appellees urge that the complaint to the Commission was insufficient to raise the issues of section 3(4) discrimination here pressed by appellants. Rather, they contended before the Commission, as they do here, that the division of the all-rail rates was not pertinent to the section 3(4) issue on the ground that there were in existence no through routes between the railroads and the barge lines as to sulphur from Galveston to Danville. (R. 143).

The alleged waiver is based on a colloquy between Commissioner Alldredge and counsel for one of the appellants during his rebuttal argument, which is quoted in full at page 15 of appellants' brief.[2] As to the relief requested, counsel stated the request of the barge lines for joint rates to cure the discrimination.

---

[2] When that colloquy is referred to in the brief of the Commission, only selected phrases are quoted. (ICC 18, 53). When quoted in the brief of the railroad appellees, the last inquiry by Commissioner Alldredge and counsel's reply thereto are omitted. (RR. 9). The counsel mentioned spoke only for Federal Barge Lines, Inc. (R. 122).

He also stated that the complaint to the Commission contained a general prayer "for such other relief as may seem proper" (R. 147-148). Under that prayer the Commission could cure the discrimination shown by prescribing a proportional rate on ex-barge sulphur equal to the division which the railroad appellees accept out of the all rail joint rate. Section 6(11)(b) of the Interstate Commerce Act[3] confers a specific power on the Commission to prescribe proportional rates lower than local rates on ex-water traffic of common carriers by water. The fact that Section 6(11)(b) was not specifically mentioned in the complaint does not lessen the authority of the Commission to exercise the power there conferred when appropriate to its administration of the substantive provisions of the Interstate Commerce Act. *Chicago R. I. & P. R. Co.* v. *United States*, 274 U.S. 29, 36-37 (1927).

The phrase used by counsel, "issues in our complaint", when replying to an inquiry as to the form of the relief sought obviously was inept. However, the context makes plain that his response meant "That

---

[3] Section 6(11)(b) of the Interstate Commerce Act (49 U.S.C. 6(11)(b)) empowers the Commission as to traffic transported by common carriers by water in interstate commerce:

"To establish proportional rates, or maximum, or minimum, or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water."

is not the specific relief requested." In any event, counsel's statement cannot possibly be construed as waiving *any* issue as to the fact of discrimination or how caused, even as to Federal Barge Lines, Inc., for whom he spoke.

II.

The Commission Has the Authority to Require the Railroad Appellees to Join Appellants in Through Routes and Joint Rates in Order to Cure Section 3(4) Discrimination in Rates and Charges, Even If There Were No Proof of Public Interest to Support Independent Action Under Sections 15(3) or 307(b)

All appellees contend that the Commission has *no* power to compel through routes and joint rates, *differential or otherwise*, to cure discrimination under section 3(4) and that it has power to compel such routes or rates only upon findings of public interest under sections 15(3) and 307(d). (ICC 10-11, 23-26; RR 15-16, 18) They further assert that the prohibition in section 3(4) does not relate to disparate treatment in the absence of existing through routes and, since no through routes presently exist between appellants and the railroad appellees that there can be no violation of that section (ICC 30, 33; RR 16, 27, 29). The railroad appellees say that all cases relied upon by appellants which involved discrimination in charges show that there were existing through routes (RR 27).

The latter claim is shown to be false and the arguments of counsel for the Commission on the point are shown to be contrary to the Commission's own past administration of the Interstate Commerce Act by the cases summarized on pages 32-39 of the Commission

Brief. The point under discussion is purely a ques
tion of law. It relates solely to the power of the Com
mission to enforce the prohibition of discrimination
contained in section 3(4), independently of its powe
to prescribe through routes and joint rates upon
showing of public interest under sections 15(3) an
307(d). As is acknowledged in the Commission'
brief, its power to enforce section 3(4), despite the lac
of existing through routes with the complaining car
rier, was exercised in *Denver & Rio Grande RR Co.* v
Union Pacific RR Co., et al., 287 I.C.C. 611 (1953)
Decatur Navigation Company v. *Louisville & Nash*
ville Railroad Company, et al., 31 I.C.C. 281, (1914)
Pacific Navigation Company v. *Southern Pacific Com*
pany, et al., 31 I.C.C. 472 (1914); and *White Star Lin*
v. *New York Central Railroad Company, et al.*, 8
I.C.C. 473 (1923). See also *St. Louis, Springfield &*
Peoria Railroad, et al., v. *Peoria & Pekin Union Rail*
way Company, 26 I.C.C. 226 (1913); *Nueces Count*
Navigation District No. 1 v. *Baltimore & Ohio Railroa*
Company, et al., 223 I.C.C. 75 (1937); *Alabama, Ten*
nessee & Northern Railroad Corporation v. *Souther*
Railway Company, et al., 148 I.C.C. 708 (1928); an
Chicago, Milwaukee & St. Paul Railway Company v
Great Northern Railway Company, 49 I.C.C. 30
(1918). In *Chicago, Indianapolis, & Louisville Rail*
way Company, et al. v. *U. S.*, 270 U.S. 287, 292-29
(1926), this Court sustained the Commission's powe
to cure discrimination in violation of section 3(4
when exercised independently of the powers conferre
on it by other sections of the Interstate Commerce Act

The power can be no different in the instant case. The cases cannot be distinguished on the evidence since the question is only as to the Commission's power when proceeding wholly under section 3(4).

If appellees were right as to the lack of power to enforce section 3(4) in the absence of findings of public interest under sections 15(3) and 307(d), then section 3(4) would become a meaningless enactment. Thus in the opinion of appellants it is not necessary here to reach the question of whether or not there is in existence a "through route" via the lines of appellant barge lines and appellee railroads, within the meaning of the Act. Were it necessary to reach that point, however, the record clearly establishes the existence of a "through route" as defined by this Court in *Thompson* v. *United States*, 343 U.S. 549, 557 (1951), where it said "In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service". Here the record is clear that the local rate of the appellees applicable on sulphur delivered to them at East St. Louis, Illinois, for movement to Danville, Illinois, is an interstate rate, which presupposes that the traffic must come from beyond East St. Louis, and which was referred to by a witness for the appellees as "a proportional rate, so to speak" (R. 103). Certainly in view of that situation the appellees may not now contend that they do not at present hold themselves out to handle through traffic interchanged to them by the appellants.

III.

The Circumstances and Conditions to be Considered in Testing the Lawfulness of the Difference in Treatment Alleged to be in Violation of Section 3(4) are Limited to Those Which Relate to the Services of the Railroad Appellees From East St. Louis to Danville

Counsel for the Commission seek to justify the discrimination of which appellants complain on the ground that the all-rail routes from sulphur mines in Texas have an "inherent advantage" because the haul is direct to Danville without transfer of lading whereas the barge-rail route starts at Galveston with sulphur which has had an antecedent rail haul from a sulphur mine and that route requires a transfer of lading at East St. Louis (ICC 45-47). In their Summary of Argument, counsel say (ICC 15):

> . . . The Commission considered such circumstances and found that the National Transportation Policy did not require it to compel the railroads that originate the traffic, to relinquish their long haul (over 1,000 miles) to the barge lines and accept instead a short haul of only 240 miles (60 miles from the mines to Galveston and 180 miles from East St. Louis to Danville) in favor of a barge haul of 1,400 miles from Galveston to East St. Louis over a circuitous route.

The reports of the Commission do not contain, even by implication, any finding like that claimed.[4] The only reference to "inherent advantage" is in the report of Division 3 (R. 31) affirmed by the Commission. The actual finding is that the depressed char-

[4] Quoted in appellants' brief, pp. 32-33; ICC brief, p. 47.

acter of the $2.95 local rail rates from East St. Louis to Danville excuses the refusal of the railroad appellees to accept less than that amount for their services in transporting barge-rail sulphur. The depressed character of that rate cannot, as a matter of law, excuse the refusal of the railroad to treat appellants as favorably as they treat their rail connections. (Appellants' brief, pp. 32-34)

If the Commission had based its decision on the premises stated by its counsel, it would have committed an additional error. The defendants in the Commission proceeding participate in the involved all-rail routes *only* from East St. Louis; they do not reach the sulphur mines or Galveston and do not participate in the hauls therefrom to East St. Louis. If they may lawfully treat barge line connections less favorable than they treat their rail connections, it must be because of differing circumstances *on their own lines*, and not because of circumstances on the lines of their connections. *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, 581 (1946).

Counsel in asserting that protection of the "long-haul" of the railroads was a controlling factor in the Commission's decision has apparently overlooked the fact that the railroad appellees have no line between the termini of Galveston and Danville except their rails from East St. Louis to Danville. Counsel also apparently overlooked the law on the point, that is, the exception to the prohibition against short-hauling con-

tained in section 15(4) of the Interstate Commerce Act which reads as follows:

> Section 15(4).
>
> "* * * In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, . . .

IV.

The East St. Louis—Danville Services of the Railroad Appellees are the Same When Sulphur Is Received From Barge Line Connections as When Received From Railroad Connections

The railroad appellees assert a lack of supporting evidence of record for the statement by appellants that the services rendered by those appellees is the same on ex-barge sulphur received by them at East St. Louis, as on ex-rail (RR 4, 14, 30). The Commission acknowledges a "similar service" in stating its question No. 3 (ICC 2, this question being as to the division vs. a local rate) but does not note that circumstance when discussing discrimination caused by the through route and joint rate arrangements with railroad connections but not with the appellants (ICC 2, 21, 22).

That the services are the same is not open to doubt. The barge line rate of $5.32, the water factor in the

present barge-rail combination through rate, is published as an "inclusive" rate and covers the transfer of the sulphur from barge to cars and the absorption of the charge for switching the traffic from the barge terminal to interchange with the railroad appellees at East St. Louis (R. 83, 84). If a joint rate is established, the transfer and that charge will be absorbed out of the barge line division (R. 84). The rail service from interchange at East St. Louis to Danville and delivery at that point could not possibly differ according to the mode of transportation used up to East St. Louis.

Both Division 3 (R. 24) and the Entire Commission (R. 30) noted that the costs incident to placing the traffic on the rails at East St. Louis would be absorbed by the barge lines.

At the oral argument before the Commission, counsel for appellants said (R. 129):

> "Now, as to the service, there is no dispute on this record that the service is identical, whether it is brought to East St. Louis by the barge line or whether it is brought to East St. Louis by the Missouri Pacific Lines, from Galveston or New Gulf, Texas."

Counsel for the railroad appellees took no issue in his argument with that statement (R. 136-144).

V.

The Mechling Case Is Not Distinguishable on the Facts

Contrary to the claims of appellees (ICC 16, 40, 44-45, 60; RR 23, 24, 35-36) the decree affirmed in the *Mechling* case, *supra*, required, in part, separately established rates on ex-barge grain *equal* to the divisions east of Chicago out of all-rail one-factor joint through rates *from the same origins*—those in Illinois. (Appellants' Brief, pp. 46-49). If that were not so, why did counsel for the Commission in its brief in that case in this Court oppose the use of all-rail divisions as the standard of lawfulness for the separately established rate on ex-barge grain from Illinois origins?

Appellees assert that the grain involved in the *Mechling* case moved over through routes at through rates on through bills of lading (ICC 40, 45; RR 23, 35). That was not true as to the ex-barge grain. The barge transportation to Chicago was port-to-port service not subject to the Interstate Commerce Act when the case before the Commission started in 1939. Then, and also after the enactment in 1940 of Part III of the Act which brought port-to-port service under regulation, the barge grain was destined only to Chicago and went into storage at that point. That was also true as to all ex-lake grain and as to a large portion of the all-rail grain. This Court has held that under such circumstances neither through rates nor through routes exist. (*A.T. & S.F. Ry. Co. v. U.S.*, 279 U.S. 768, 777, 779).

This Court applied section 3(4) in the *Mechling* case to compel rates on ex-barge grain the same as the charges on ex-rail and ex-lake grain, despite the fact that there were no formal existing through routes between either the barge lines or the preferred lake carriers and the rail lines as to grain destined to Chicago and stopped there for storage or processing. The fact that some all-rail grain moved in continuous through service at through rates and over through routes was rejected by this Court as without legal relevancy.

Respectfully submitted.

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Proof of Service

In compliance with the applicable provisions of the Revised Rules of the Supreme Court of the United States, I, Donald Macleay, one of the attorneys for the several appellants on whose behalf the foregoing Reply Brief of Appellants is submitted, and a Member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing document on counsel for the several parties to this proceeding, as follows:

1. On the United States of America by mailing copies in duly addressed envelopes with first class postage prepaid to:

Honorable Simon E. Sobeloff
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

Honorable Stanley N. Barnes
Assistant Attorney General
Department of Justice
Washington 25, D. C.

Daniel M. Friedman, Esquire
John Bodner, Esquire
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Department of Justice
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and with air-mail postage prepaid to:

Malcolm R. Wilkey, Esquire
United States Attorney for the
Southern District of Texas
Room 205, Post Office Building
Houston, Texas.

2. On the Interstate Commerce Commission by mailing copies in duly addressed envelopes with first-class postage prepaid to

Robert W. Ginnane, Esquire
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Interstate Commerce Commission
Washington 25, D. C.

Samuel R. Howell, Esquire
Associate General Counsel
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3. On the New York Central Railroad Company, Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad Company, and Wabash Railroad Company, by mailing copies in duly addressed envelopes with first-class postage prepaid to

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This, the 22nd day of March, 1956.

DONALD MACLEAY

Office - Supreme Court
FILED
AUG 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 233

DIXIE CARRIERS, INC., COYLE LINES, INCORPORATED, AMERICAN BARGE LINE COMPANY, FEDERAL BARGE LINES, INC.,
Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, et al.,
Appellees.

Appeal from the United States District Court for The Southern District of Texas, Houston Division.

MOTION TO AFFIRM ON BEHALF OF APPELLEES, THE NEW YORK CENTRAL RAILROAD COMPANY, et al.,

JOHN A. DAILY,
1225 LaSalle Street Station,
Chicago 5, Illinois

Attorney for Appellees,
The New York Central Railroad Company, Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad Company, and Wabash Railroad Company.

McCORMICK AND HENDERSON, INC., CHICAGO

1) That the assailed rates were not only reasonable, but were in fact, severely depressed as a result of competition. They were lower by far than similar rates in the same area.

2) That there was no showing of public interest.

3) That no evidence was adduced to justify any particular differential in the barge-rail rate.

4) That a prior rail proposal which would have resulted in a reduction of the local rate from East St. Louis to Danville, was, in fact, protested by these barge lines and subsequently cancelled.

5) That if any reduction in the barge-rail charge is necessary, it should come out of the barge factor and not out of the depressed rail factor.

All of these considerations entered into the decision and since they are supported by substantial evidence, the result should not be disturbed on judicial review. *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, 536; *McLean Trucking Co.* v. *United States*, 321 U. S. 67. "The accomodation of the factors entering into rate structures, including competition, is a task peculiarly for the Commission." *Alabama Great Southern Railroad Co., et al* v. *United States, et al.*, 340 U. S. 216, at p. 224.

IV.

The fourth question presented requires no reply. The lower court made an independent examination of the record and came to the same conclusions drawn by the Commission.

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CONCLUSION

We respectfully submit, therefore, that the appellants present no substantial question for the decision of this Court, and that the judgment and decree of the District Court should be affirmed.

JOHN A. DAILY,
Attorney for Appellees,
The New York Central Railroad Company, Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad Company, and Wabash Railroad Company.

August, 1955.

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PROOF OF SERVICE.

In compliance with the applicable provisions of the Revised Rules of the Supreme Court of the United States, I, John A. Daily, attorney for certain appellees on whose behalf the foregoing Motion to Affirm is submitted, and a Member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing document on counsel for the several parties to this proceeding, as follows:

1. On the United States of America by mailing copies in duly addressed envelopes with air mail postage prepaid to:

   Honorable Simon E. Sobeloff
   Solicitor General of the United States
   Department of Justice
   Washington 25, D.C.

   Honorable Stanley N. Barnes
   Assistant Attorney General
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   James E. Kilday, Esquire
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   Special Assistants to the Attorney General
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   Malcolm R. Wilkey
   United States Attorney for the Southern District of Texas
   Room 205, Post Office Building
   Houston, Texas

2. On the Interstate Commerce Commission by mailing copies in duly addressed envelopes with air mail postage prepaid to:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 233

DIXIE CARRIERS, INC., COYLE LINES, INCORPORATED, AMERICAN BARGE LINE COMPANY, FEDERAL BARGE LINES, INC.,
Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, et al.,
Appellees.

Appeal from the United States District Court for The Southern District of Texas, Houston Division.

MOTION TO AFFIRM ON BEHALF OF APPELLEES, THE NEW YORK CENTRAL RAILROAD COMPANY, et al.,

Appellees, The New York Central Railroad Company, Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad Company, and Wabash Railroad Company, intervened in the District Court in support of the order of the Interstate Commerce Commission, and now move

Samuel R. Howell, Esquire
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Washington 25, D.C.

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3. On the Dixie Carriers, Inc., Coyle Lines, Incorporated, American Barge Line Company, and Federal Barge Line Company by mailing copies in duly addressed envelopes with postage prepaid to:

Nuel D. Belnap, Esquire
1 North LaSalle Street
Chicago, Illinois

and with air-mail postage prepaid to:

Donald Macleay, Esquire
1625 K Street, N.W.
Washington 6, D.C.

This, the 8th day of August, 1955.

JOHN A. DAILY

that the final judgment and decree of the District Court be affirmed on the ground that the questions are so unsubstantial as not to warrant further argument.

STATEMENT

In their "Statement Of The Case" (Statement As To Jurisdiction, pps. 6-9) the appellants have correctly stated the mechanics by which this matter proceeded through the Commission and the lower court. Certain omissions and liberties taken therein, however, require a brief statement by the appellees.

The sulphur in question does not originate at Galveston. As pointed out by the lower court, it originates at mines in the southwest, necessitating a previous rail haul from the mines to Galveston for loading into barges. The movement via plaintiffs' lines, therefore, would be rail-barge-rail. Plaintiffs, however, seek the establishment of a through route and joint rate only for the barge-rail portion beyond Galveston.

The plaintiffs do not seek judicial review of those portions of the Commission's decision dealing with reasonableness of the rail rates and the necessity or desirability of the establishment of through routes and joint rates. These questions, however, cannot so easily be divorced from the Commission's decision. The latter must be considered and reviewed as a whole. The allegation that neither the Commission nor the Court properly scrutinized the issues presented is unfounded. Such contentions may easily be refuted by examination of the Commission's final report, and are further belied by the opinion of the lower court, wherein it is stated:

"We have however, independently of the conclusions reached by the Commission, considered the Record and reached substantially the same conclusion."

The plaintiffs further contend that the evidence shows that "for their services rendered under all-rail joint rates the defendant railroads accepted as compensation a division less than their said local rate, although there was no difference *shown* between the services rendered by them on ex-barge traffic and those rendered by them on all-rail traffic." There was no difference *shown*, there was no evidence, *pro* or *con*, on the question, and properly so, since the issue was not raised in the plaintiffs' complaint before the Commission. (Appendix A)

ARGUMENT

I.

(1)

In a preamble under "Questions Presented", (Statement As To Jurisdiction, p. 3) the plaintiffs state that:

> "The matter complained of is the charging by said railroads of their East St. Louis—Danville local rail rate on ex-barge sulphur originating at Galveston . . . and delivered to them by their water carrier connections at East. St. Louis, while contemporaneously joining with connecting railroads at East St. Louis in a joint through rate from Galveston . . . out of which said railroads accept a secret, contractual division less than said local rate. . . . The services rendered . . . on the ex-barge sulphur are the same as on the through all-rail sulphur."

If this is *now* the gist of the plaintiffs' case, then it is clear that they cannot prevail, since this issue is absent from the complaint filed with the Commission upon which this entire proceeding is based. Inasmuch as the record has not yet been printed for the Court, appellees have reproduced the complaint, and it is attached hereto as Appendix A.

The facts upon which the complaint is based are set out in Paragraph III of Appendix A. They are, briefly: (1) that the defendants participate in joint rates over all-rail routes while refusing to so join with the plaintiffs in joint rates over barge-rail routes; (2) that as a result the existing charges over barge-rail routes are *excessive and unreasonable;* (3) that it is *necessary or desirable in the public interest* that through routes and joint rates thereover be established with reasonable differentials under the all-rail basis, and (4) that the refusal of the defendants

to so join is discriminatory against the plaintiffs. There is no hint of an attack on the allegedly varying charges of the rail carrier defendants beyond East St. Louis.

The statement at Paragraph V of Appendix A that "defendants are maintaining rates and charges which are discriminatory in violation of section 3(4)" refers solely to the matter set out in Paragraph III, that the defendants refuse to establish through barge-rail routes and joint rates thereover with "reasonable" differentials under the all-rail rates. The only other reference to discrimination in charges, therefore, was made in connection with a proposed all-rail reduction. This proposal, however, was subsequently cancelled and never took effect (R. p. 40).

That the plaintiffs' complaint did not and was not intended to raise the issue of local rates versus divisions was made entirely clear by counsel for the plaintiffs at the oral argument before the entire Commission in the following colloquy:

(Record, p. 112)

> Commissioner Alldredge: "Are you asking for establishment of joint through rates or simply the removal of discrimination, either that way, or through the establishment of proportional rail rates?"
>
> Mr. Belnap: "No, we are asking for joint through rates, and urge you that this is the necessary step to remove the discrimination demonstrated."
>
> Commissioner Alldredge: "If the Commission required the railroads to establish beyond East St. Louis a proportional rate."
>
> Mr. Belnap: "Equivalent to their division, that would be one method of curing the thing about which we complain but that isn't the relief we have asked. *I don't believe that is really one of the issues of our complaint* because our complaint asks for through, joint through rates to cure the discrimination."

The authorities are unanimous in that a question not raised or waived before an administrative body cannot and will not be considered on judicial review of the agency's action. *United States* v. *Baltimore & Ohio R.R. Co.*, 231 U.S. 274; *United States ex rel Coltman* v. *Bullock*, 110 F. Supp. 126.

In *Helvering, Commissioner Of Internal Revenue* v. *Tex-Penn Oil Co.*, 300 U.S. 481, this Court stated at p. 498:

> "He (the Commissioner) sought no ruling upon the question from the board or the lower court and is therefore not entitled to have it decided here. *Helvering* v. *Minnesota Tea Co.*, 296 U.S. 378, 380."

It is thus clear that what the plaintiffs refer to as "The matter complained of" is not properly before this Court for review, and the first specific "question presented" is therefore irrelevant in this proceeding.

(2)

Assuming *arguendo* that the question was both relevant and properly presented, it is well settled that a "division" of a joint through rate is not a "rate" or "charge" within the meaning of the Interstate Commerce Act, and is not comparable with "rates, fares and charges" as such.

Divisions are, when referred to, specifically designated in the Interstate Commerce Act. Many sections of the Act refer to rates, fares and charges. Comparatively few, however, deal with divisions. It will be noted, for example, that Section 6 [63 Stat. 486, 49 U.S.C.A. 6] provides for the publication of schedules showing all "rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier." Divisions of joint rates, however, are not required to be published. *Acme Mills* v. *Director General*, 38 I.C.C. 492; *Chase & Co.* v. *N.Y.C. R.R. Co.*, 161 I.C.C. 614, 616.

Another example of the difference between divisions and "rates, fares and charges" may be found in Section 15(6) of the Act. [41 Stat. 486, 49 U.S.C.A. 15(6)]. Therein the Congress has directed that the Commission, in prescribing divisions, must take into consideration certain specific factors. Failure to follow the conditions of Section 15(6) invalidates the Commission's order. *Brimstone Railroad And Canal Company* v. *United States, et al.*, 276 U.S. 104. The Act contains no comparable provision covering "rates, fares and charges."

In its earliest decisions, the Commission has held that divisions are unlike and not comparable to "rates, fares and charges" or more specifically here, a local rate. In *Board of Trade of Troy, Ala.* v. *A.M. Ry.*, 6 I.C.C. 1, 23, the Commission stated:

> "A local rate covers the expense of two terminals, but a division of a through rate * * * can only embrace the expense of one. Because of this difference in expense, among other reasons, local rates are as a general rule much higher in proportion to the length of the haul than through rates or any division thereof."

(3)

It will be noted that the plaintiffs' question is based solely upon the ruling of this Court in *Interstate Commerce Commission* v. *Mechling*. 330 U. S. 567. The *Mechling* decision is not controlling here, and has been distinguished by the Commission and by the lower court in their separate opinions.

The *Mechling* decision dealt with the proportional rate paid by the shipper as one of the components of a combination rate which proportional was higher on ex-barge grain than on ex-rail. These were separately established and published rates. As recognized by the Commission, the latter decision did not involve the question of unpublished divisions of joint rates.

The lower court further distinguished the *Mechling* proceeding from the case at bar, noting the absence of evidence of public interest, and the lack of evidence of discrimination. The *Mechling* proceeding, moreover, did not involve the question of through routes or joint rates.

The plaintiffs themselves admit, at pps. 13-14 of the Statement as to Jurisdiction that the *Mechling* case is not actually controlling herein, but state that the question should nevertheless be settled by the Supreme Court. This, of course, refers to the issues of divisions versus local rates, previously disclaimed in this proceeding. Even were it not disclaimed, a long line of Commission and Supreme Court decisions have established that local rates are based upon considerations entirely different from those entering into divisions of joint rates, that the two are therefore wholly unlike, that a division is ordinarily less than a local rate, and that neither is a proper measure of the other.

As a rule the division of a carrier on through business is less than its local rate between the points where the division applies. *Gump* v. *B. & O. R. R.*, 14 I.C.C. 98, 105, and a division of a joint rate which a carrier accepts as its proportion is not a test of the lawfulness of its separately established rates. *Bituminous Coal to Youngstown*, 163 I.C.C. 3, 12.

This proposition has on numerous occasions found approval in the Courts. In *Texas & Pacific Ry.* v. *Interstate Commerce Commission*, 162 U. S. 197, the Court stated at p. 239:

> "The mere fact that the disparity between the through and local rates was considerable did not, of itself, warrant the court in finding that such disparity constituted unjust discrimination."

The principle was unequivocally confirmed in *Parsons* v. *Chicago & Northwestern Ry.*, 167 U. S. 447, the Court stating at p. 457:

> "That the portion of a through rate received by one of the companies parties thereto may be less than its local rate is not questioned."

The joint through tariff of two connecting railroads is therefore not a standard by which the local tariff of either can be declared in violation of the prohibition against preferences prohibited by Section 3. *Tozer* v. *United States*, 52 F. 917. The *Tozer* opinion cited with approval the case *of Chicago & Northwestern Ry. Co.* v. *Osborne*, 52 F. 912, cert. denied, 146 U. S. 354. Therein, after propounding the principle that a through tariff is not standard by which the separate tariff of either railroad may be condemned, the Court stated at p. 916:

> "Again, at the time of the passage of this act joint through tariffs were well known, as well as the fact that they were generally less than the sum of the local tariffs . . . if Congress had intended to make the local tariff subordinate to or measured by the joint tariff, its language would have been clear and specific."

If follows that the first question presented by the plaintiffs, while not properly raised, has nevertheless been previously resolved in the negative.

II.

The second question presented assumes a fact not in evidence: to wit, that the rail carrier performs the same service in each instance. As heretofore stated, there was no evidence introduced by either party on that subject. The issues presented to the Commission by the plaintiffs' complaint required none. The question thus presented to the Court, shorn of the unwarranted statement of fact, is: Is it unlawful *per se* under Section 3(4) of the Act for a rail carrier to refuse to join in through routes and joint rates with a water carrier, the rail carrier having previously established such arrangements with a connecting rail carrier? Otherwise stated, when one carrier joins

in through routes and joint rates with another, must the first carrier thereafter, as a matter of law, join in similar arrangements with all other carriers, regardless of circumstance? Secondly, in the case of barge-rail rates, must the Commission in every instance establish differentials under all-rail rates even though there is no evidence of what, if any, differential is required.

It will be noted that the question, as proposed by the plaintiffs, contains the proviso of equality of services (as to which there was no evidence). Furthermore, the third question proposed by the plaintiffs inquires as to whether certain evidentiary matters noted by the Commission are sufficient to justify a difference in treatment, thus recognizing both that there are some differences and that those differences may justify dissimilar results.

That the question of discrimination is not purely one of law but one of fact has long been recognized by this Court. *United States* v. *Louisville & Nashville Railroad Co.*, 235 U. S. 314. *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534. The question of discrimination is one upon which the finding of the Commission, supported by substantial evidence, is conclusive. It is beyond the province of the court to consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases. *Virginian Railway Co.* v. *United States*, 272 U. S. 658.

The Commission has upon many occasions held that whether through routes or joint rates shall be established depends upon such matters as public demand or necessity and whether or not the absence of joint rates is detrimental or obstructive to the public interest and the ends of justice between the parties. *Empire Steel & Iron Co.* v. *Director General*, 56 I.C.C. 158, 162. The question of whether or not

they should be established is one calling for the exercise of the Commission's judgment upon the circumstances and conditions of each particular case. *Beaver Sand Co.* v. *Director General*, 66 I.C.C. 285, 288-289.

In *Southern Pacific Company* v. *Interstate Commerce Commission*, 200 U. S. 536, the Court stated at p. 553:

> "The whole question of joint through tariff rates . . . is one of agreement between the companies, and they may, or may not, enter into it, as they think their interests demand. And it is equally plain that an initial carrier may agree upon joint through rates with one or several connecting carriers who, between each other, might be regarded as competing roads."

It will further be noted that the power of the Commission to establish through routes and joint rates does not stem from Section 3(4) of the Act. That power is found only in Section 15(3) of the Act and the Congress therein prescribed the requisite that such through routes and joint rates as are desired must be shown "necessary or desirable in the public interest." *Virginian Railway Company* v. *United States, et al.*, 272 U. S. 658; *Interstate Commerce Commission* v. *Columbus & Greenville Ry. Co.*, 319 U. S. 551, 555. *Thompson* v. *United States*, 343 U. S. 549.

The question whether the public interest would be so served is to be determined by the facts and circumstances of each case, including the nature of the traffic and the character of the transportation service. *Inland Navigation Co.* v. *B. G. & T. R. R.*, 281 I.C.C. 515, 534, and where the general public is adequately served and there is no apparent necessity or demand on the part of shippers for through routes and joint rates, the Commission will not require their establishment merely to enable one carrier to wrest greater compensation from its connection. *New York Dock Railway* v. *B. & O. R. R.*, 32 I.C.C. 568, 575.

Aside from the *Mechling* case, the only other proceeding cited by the plaintiffs in their behalf is the decision of the Commission in *Denver & Rio Grande Western Railroad Company* v. *Union Pacific Railroad Company, et al.*, 287 I.C.C. 611. The Commission's decision therein has been the subject of judicial review in the District Court of Omaha, Nebraska, (No. 76-53. *Union Pacific Railroad Company, et al.* v. *United States of America and Interstate Commerce Commission*), and in the District Court of Colorado (No. 4492 Civil. *The Denver & Rio Grande Western Railroad Company* v. *United States of America and Interstate Commerce Commission*). The Nebraska court reversed and remanded in part. The Colorado court reversed and remanded the Commission's order in its entirety. Both decisions are now before this court on appeal, and it would therefore seem inappropriate to comment thereon. However, to rebut certain inferences drawn therefrom by the plaintiffs, a brief clarification will be made.

As admitted by the plaintiffs, the latter decision, popularly referred to as "The Ogden Gateway Case" involved other and much broader issues. It did not involve any question of divisions versus published rates, and, contrary to the plaintiffs' contention here that the Commission's order was based solely on Section 3(4) of the Act, the decision plainly states at 287 I.C.C. 611, p. 619:

> "The paramount issue . . . is whether the Ogden gateway should be made available to shippers for routing, at joint rates equal to those over competitive routes of all traffic in connection with the Rio Grande between the areas involved . . . that issue falls within the limitations of section 15(3) and (4). In addition, evidence was presented bearing upon the issues of reasonableness . . . discrimination . . . undue prejudice. *These issues are closely related and will be considered together.*"

and in dealing with certain established routes, at p. 658:

> "There is upon this record . . . . no substantial evidence as to the transportation conditions over the established routes referred to. A finding of discrimination under Section 3(4) of the Act must be supported by a showing that the transportation conditions are no less favorable over the routes alleged to be discriminated against than over routes alleged to be preferred. No such showing has here been made."

It is also noteworthy that in the excerpt from the Nebraska court's decision cited by plaintiffs, that court refused to disturb the Commission's "factual conclusion" of discrimination.

It must be remembered that the plaintiff's complaint does not seek solely the establishment of through barge-rail routes and joint rates, but alleges that such joint rates be prescribed with "reasonable" differentials under the all-rail basis. The Commission found that there was no evidence that any particular differential was required to remove the alleged discrimination. This finding was not appealed to the lower Court and does not appear to have been presented here. Clearly, the Commission need not prescribe a differential where none is required by the evidence, nor will this court under such circumstances reverse the Commission's order.

III.

The third question presented, contrary to the plaintiffs' theory, deserves some attention. This complaint raised issues of reasonableness, public interest and discrimination. The Commission's opinion, in justice, must be considered as a whole. The Commission found upon the entire record:

lants as connecting water carriers, in violation of Section 3(4) of the Act. The Commission was asked to require the railroads to establish and maintain such through barge-rail routes and joint through rates, with reasonable differentials under the all-rail rates as the Commission deemed reasonable, just and otherwise lawful.

Following hearings on the complaint before a Commission hearing examiner and the service of a recommended report and order, the Commission, by Division 3, issued its report and order on December 22, 1952 (one Commissioner dissenting), in which it found that the evidence did not warrant a finding that the present through barge-rail rate is unreasonable or otherwise unlawful, and that such evidence affords no basis for a finding of unlawful discrimination under Section 3(4) of the Act. 287 I.C.C. 403. Appellants' petition for reopening, reconsideration and oral argument was granted and oral argument was heard. In its report on reconsideration issued January 19, 1954, the entire Commission (291 I.C.C. 422) affirmed the findings of Division 3 (three Commissioners dissenting and one not participating). The District Court unanimously sustained the Commission's order (129 F. Supp. 28), and denied appellants' motion for a new trial, and to amend findings of fact and conclusions of law.

The appellants contend that the Commission erred in holding that divisions of joint rates are the result of contractual arrangements between car-

riers and are not "rates" or "charges" as those terms are used in Section 3(4) of the Act, and in failing to take into consideration the difference in treatment of barge and rail connections and find as a fact that such treatment was nondiscriminatory.

Appellants' contention with respect to the alleged violation of Section 3(4) is grounded upon the claim that out of the joint barge-rail rate on sulphur of $6.66 from Port Sulphur, La., to Danville, the barge lines' division is $4.40 for their haul to East St. Louis and the rail carriers' division is $2.26 for their haul from East St. Louis to Danville, while the rail carriers operating east of St. Louis receive from their connecting rail lines, reaching that point from Galveston, a division of the all-rail rate of $9.184, an amount (not revealed in the record) less than their local rate of $2.95 for the haul from East St. Louis to Danville. In other words, plaintiffs contend that the separately established rate paid by a shipper on ex-barge traffic (from Galveston) beyond East St. Louis, is greater than the unpublished division of a joint through all-rail rate received by the rail carriers for the transportation beyond East St. Louis on ex-rail traffic moving from the same origin to the same destination.

ARGUMENT

In their complaint before the Commission appellants actually charged that the railroads involved have failed to establish through routes and joint rates with the water carriers in violation of Sec-

tions 1 and 307(d), and that they are maintaining rates and charges which are discriminatory against the barge lines in violation of Section 3(4). The latter section deals only with "rates, fares, and charges" insofar as pertinent here.[1] The Commission found that a division of a joint rate is not a charge within the meaning of Section 3(4). (291 I.C.C. 422, 424). It is difficult to see how the issue of discrimination here can be predicated on the provisions of that section.

Appellants rely on *I.C.C.* v. *Mechling,* 330 U.S. 567, which is distinguishable. That case is concerned only with proportional rates which were identical in nature and in the basis of their establishment, and no single factor rates were involved therein. In the instant case, the Commission points out (291 I.C.C. 422, 424): * * * * * * * * * *

> The claim here is not that the complainants are discriminated against in the matter of divisions of joint rates, as was the case in *Western Pac. R. Co.,* v. *Southern Pac. R. Co.,* 55 I.C.C. 71, referred to by the complainants, nor that the separately established rate paid by the shipper as one of the components of a combination rate is greater for the transportation of ex-barge traffic than for ex-rail traffic, which

[1] Section 3(4), in applicable part, reads as follows:

> All carriers subject to the provisions of this part * * * shall not discriminate in their rates, fares, and charges between connecting lines, * * *. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

was the situation in *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, also cited by the complainants, but that the separately established rate paid by the shipper on ex-barge traffic beyond East St. Louis is greater than the unpublished division of a joint through all-rail rate received by the rail carriers for the transportation beyond East St. Louis on ex-rail traffic moving from the same origin to the same destination. The comparison is between a rate or charge paid by a shipper and a division of a joint rate received by rail carriers, and is of unlike things. Basically, divisions of joint rates are the result of contractual arrangements between carriers; they are not "rates" or "charges" as those terms are used in section 3(4) of the act. A seemingly contrary opinion expressed in *Western Pac. R. Co.* v. *Southern Pac. Co., supra,* upon which the complainants rely, was made, as above indicated, under circumstances different from those now before us, and is not controlling here. * * *

The Commission has held since the earliest days of its existence as a regulatory body that a comparison of a division of a joint rate and a local rate is not a proper test of the lawfulness of either. *Board of Trade of Troy, Ala.* v. *A.M. Railway,* 6 I,C.C. 1; *Bituminous Coal to Youngstown,* 163 I.C.C. 3, 12. The Court in *Texas & Pacific Ry.* v. *Interstate Commerce Commission,* 162 U.S. 197, approved this principle.

The distinction between local rates and divisions of joint rates is emphasized by the fact that when Congress amended Section 15 of the Act in 1940,

Appendix A

BEFORE THE
INTERSTATE COMMERCE COMMISSION

American Barge Line Company
Coyle Lines, Inc.
Dixie Carriers, Inc.
Inland Waterways Corporation
(Operating Federal Barge Lines)
Complainants,

vs.

Chicago & Eastern Illinois Railroad Company
Illinois Terminal Railroad Company
The New York Central Railroad Company
Wabash Railroad Company
Defendants.

Docket No. 30731

COMPLAINT

The complaint of the above-named complainants respectfully shows:

I.

That complainants are corporations engaged in transportation as common carriers by water of general commodities (including sulphur) under certificates of convenience and necessity issued by the Interstate Commerce Commission; that over routes authorized by their respective certificates and to the extent their respective routes traverse the waterways named below, complainants are so engaged on the Mississippi River between East St. Louis,

Illinois, and Port Sulphur, Louisiana, and on the Gulf Intracoastal Canal between New Orleans, Louisiana, and Galveston, Texas; that the transportation of sulphur by complainants from Galveston via New Orleans to East St. Louis is under circumstances and conditions which subject such transportation to Part III of the Interstate Commerce Act; and that said complainants are connecting carriers of the above-named defendants insofar as said defendants and railways connecting therewith operate to, from and via ports on the waterways just named.

II.

That the defendants above-named are common carriers by railroad engaged in interstate commerce between various states in the United States and as such defendants are subject to the provisions of the Interstate Commerce Act.

III.

That the defendants, to the extent they participate in the transportation, maintain on sulphur in carloads from Galveston, and other origins in Texas to Danville, Illinois, joint rates over through all-rail routes while contemporaneously refusing to join complainants in joint differential rates over through barge-and-rail routes from Galveston to Danville; that as a result the existing rates and charges over barge-and-rail routes from Galveston to Danville are excessive and unreasonable; that it is necessary or desirable in the public interest for the defendants and the complainants to establish such through barge-and-rail routes and joint rates thereover and to maintain in connection therewith reasonable differentials under the corresponding all-rail rates; and that said refusal of the defendants is discriminatory against complainants as connecting carriers, said discrimination being in favor of connecting carriers by railroad with whom said defendants participate in the maintenance of through all-rail routes and joint rates thereover.

IV.

That the defendants have now published a reduction in their all-rail rates from both Galveston and other Texas points and from Port Sulphur, Louisiana, to Danville, as carried in Supplement No. 57 to S. W. L. Tariff No. 102-W, Agent D. Q. Marsh's I.C.C. 3862, effective December 24, 1950, concurrently with an application for relief from the Fourth Section, S.W.F.B. B-4237; that publication of such reduction while refusing to join complainants in reasonable joint differential rates at reasonable divisions over existing through barge and rail routes from Galveston to Danville augments and aggravates the discrimination against complainants as connecting common carriers of property.

V.

That by reason of the facts stated in the foregoing paragraphs the defendants have failed and refused to establish and maintain reasonable through routes and joint rates with complainants in violation of sections 1 and 307(d) of the Interstate Commerce Act; and defendants are maintaining rates and charges which are discriminatory against complainants as connecting carriers in violation of section 3(4) thereof.

WHEREFORE, complainants pray that defendants be required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants, and each of them, to cease and desist from the aforesaid violations of said Act, and establish and put in force and apply in future to the transportation of sulphur between the origins and destinations named in paragraphs III and IV hereof such through routes and joint rates, as the Commission may deem reasonable and just and otherwise lawful, and that such other and further order or orders be made as the Commission may consider proper in the premises.

Dated at Chicago, Illinois, December 12th, 1950.

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No. 233

In the Supreme Court of the United States

OCTOBER TERM, 1955

DIXIE CARRIERS, INC., ET AL., APPELLANTS

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

MOTION OF THE INTERSTATE COMMERCE COMMISSION TO AFFIRM

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In the Supreme Court of the United States

No. 233

DIXIE CARRIERS, INC., ET AL., APPELLANTS

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph (c), of the Revised Rules of the Supreme Court of the United States, the Interstate Commerce Commission moves that the judgment of the District Court be affirmed.

This is a direct appeal from the final judgment entered February 16, 1955, by a specially constituted three-judge District Court convened pursuant to 28 U.S.C. 2284, dismissing appellants' complaint seeking to set aside an order of the Interstate Commerce Commission. Notice of Appeal was filed on May 17, 1955, and the appeal papers were received on July 13, 1955.

STATEMENT

Appellants filed a complaint with the Commission on December 13, 1950, alleging that the refusal of certain railroads (defendants before the Commission and intervening defendants herein) to establish and maintain reasonable through routes and joint rates with appellants on sulphur from Galveston, Tex., to Danville, Ill., is in violation of Sections 1 and 307(d) of the Interstate Commerce Act, and that said railroads are maintaining rates and charges which are discriminatory against appel-

giving the Commission definite powers (which theretofore had been uncertain) over divisions of rates, it set forth in paragraph (6) of the present section certain standards or criteria by which the Commission was to be governed in prescribing just, reasonable and equitable divisions. A search of the Act does not reveal similar provisions governing the Commission's prescription of other characters of rates. In view of the foregoing, it is submitted that the decisions of the Commission and the District Court are not contrary to the decision in the *Mechling* case as contended by appellants.

In regard to appellants' contention that the District Court did not pass upon the question of discrimination under Section 3(4) of the Act, or on the question of whether a division of a joint rate is a rate within the meaning of paragraph 4, it is submitted that the court below did consider these questions.

The Court specifically found at page 33 of the opinion (129 F. Supp. 28) that:

> When the whole record is considered in the light of all the provisions of the Act and the many cases construing same, we think plaintiffs have not shown their claim to be meritorious.

This finding or conclusion is adequate. We know of no rule or law or decision of the courts requiring that a different kind of finding or conclusion should be made or stated.

Furthermore, in regard to appellants' contention that the Court below did not pass on the question of whether a division of a joint rate is a rate within the meaning of paragraph (4) of Section , it is pointed out that this question was not specifically raised in the complaint before the Commission. In any event it will be seen from the decision of the Commission that counsel for appellant waived the question.[2] Therefore, since that question was not raised in the complaint and was waived at oral argument, the Court would have been justified in giving no consideration to it. *United States* v. *Baltimore & Ohio R.R. Co.*, 231 U.S. 274, 297). However, instead of ignoring this issue the Court passed upon it by making the finding heretofore quoted that upon the record as a whole "Plaintiffs have not shown their claim to be meritorious" (p. 33), and that the *Mechling* case "is not controlling here." (p. 35.)

Even assuming that all the issues raised by ap-

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[2] The Commission stated in its report on reconsideration, 91 I.C.C. 422, 423, that:

> At the oral argument counsel for complainants agreed that one way the alleged discrimination could be removed would be by the use of $2.26 as a proportional rate for the services of the defendants operating from East St. Louis to Danville, which is the amount received by them as a division of the joint barge-rail rate of $6.66 from Port Sulphur to Danville. He stated, however, that he did not believe that that was one of the issues of their complaint. This belief appears to be correct. The complaint in this respect is directed against the alleged discrimination in favor of rail lines serving Galveston and not Port Sulphur, and what the rail lines receive as their share of the rate from Port Sulphur is not helpful here.

pellants may not have been discussed in the Court's opinion, nevertheless this would be similar to a court saying as this Court said in *United States* v. *Capital Transit Co.*, 338 U.S. 286, 291:

> We have examined other contentions urged in support of the District Court's judgments and find that all are without merit.

In *Schilling* v. *Schwitzer-Cummins Co.*, 142 F. 2d 82, 84, the Court said:

> * * * While counsel may be disappointed that findings do not discuss propositions sincerely contended for, that, alone, does not make them inadequate or suggest that such propositions were not understood by the court.

We, therefore, submit that it is not necessary that the trial court make findings asserting the negative of each issue of fact raised. As the Court said in *Carr* v. *Yokohama Specie Bank, Limited*, 200 F. 2d 251, 255:

> * * * Nor is it necessary that the trial court make findings asserting the negative of each issue of fact raised. It is sufficient if the special affirmative facts found by the court, construed as a whole, negative each rejected contention. The ultimate test as to the adequacy of findings will always be whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision and

whether they are supported by the evidence.
* * *

Finally, we should like to say a word in regard to appellants' contention that the Commission's finding in *Denver & R.G.W. R. Co. v. Union Pacific R. Co.*, 287 I.C.C. 611, that the failure of the Union Pacific to interchange traffic with the Rio Grande over through routes and at joint rates, while making such interchange with the Bamberger, subjected the Rio Grande to discrimination in violation of Section 3(4) of the Act. This finding was approved by the three-judge court, District of Nebraska, in *Union Pacific Company, et al. v. United States, et al.*[3]

That case is distinguishable. The shippers there were deprived of the right to route their shipments via the Rio Grande except at the higher combination rates which were substantially in excess of the joint rates.

In the instant case appellants alleged that the failure and refusal of the railroads to establish through routes and joint barge-rail rates on sulphur from Galveston, Texas, to Danville, Ill., via East St. Louis, Ill., is in violation of Sections 1 and 307(d) of the Act and was discriminatory against the water carriers in violation of Section 3(4). They requested the Commission to establish such

[3] Case not yet reported, opinion filed October 22, 1954, appeal pending before this Court in Nos. 117, 118 and 119. In another suit heard before the three-judge court, District of Colorado, Civil No. 4492, the same order was set aside in so far as it denied relief to plaintiff. Case not yet reported.

through routes and joint rates, with reasonable differentials under the all-rail rates.[4]

As a matter of fact in the instant case the all-rail rate on sulphur from Galveston to Danville, via East St. Louis, Ill., of $9.184 per ton, is higher than the present combination barge-rail rate of $8.27 by 91.4 cents, and the evidence shows that the rate over the all-rail route is already on a depressed basis (291 I.C.C. 422, 423; Tr. 39-40).

Attention is called to the fact that insofar as the instant case is concerned, Section 3(4) of the Act deals solely with "rates, fares and charges," and no mention is made therein of through routes. This Court held in *Thompson* v. *United States*, 343 U.S. 549, 558, that the existence or non-existence of a through route does not depend on the applicable rates; and that the establishment of joint rates is an entirely separate and distinct matter from the establishment of through routes. *United States* v. *Great Northern Ry. Co.*, 343 U.S. 562 at page 573. Since a through route must be established before

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Opinion filed January 13, 1955. Notice of appeal to this Court filed June 22, 1955.

[4] Division 3 of the Commission found that the establishment of the through routes and joint rates sought had not been shown to be necessary or desirable in the public interest and that a Section 3(4) violation had not been shown (287 I.C.C. 403, 407). The entire Commission, on reconsideration, approved this finding (291 I.C.C. 422, 425) and found also that the record affords no support for a finding that "the present combination barge-rail rate 91.4 cents lower than the present all-rail rate, is unreasonable for the through service offered thereunder". (p. 423) It further found that there was no evidence affording a basis for a conclusion that the proposed difference of $1.514 between the present all-rail rate from

a joint rate could be prescribed and no through barge-rail route exists, the Commission could not prescribe a through route, because, as it found, there was no showing from the evidence that through routes were necessary or desirable in the public interest.[5] It is thus believed clear that the instant case is different from the *Union Pacific* case. Each case must stand on its own facts, and the Commission in the instant case found from the facts that a violation of Section 3(4) had not been shown. On different facts and under different circumstances, it found there was a violation of Section 3(4) in the *Union Pacific* case.

For the foregoing reasons, it is evident that this appeal presents no substantial question. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

SAMUEL R. HOWELL,
Acting General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

JULY, 1955.

Galveston (which appellants sought), or any other particular differential, is required to remove the alleged discrimination against the barge lines. The record shows that no shipper appeared or evidenced any interest in the rate sought, and that the rate over the all-rail route was, in fact, on a depressed basis. The Commission then stated that it could not find that the public interest requires the establishment of the joint barge-rail rate sought. (*Ibid.*)

[5] Section 15(3) contains the following applicable provision:

The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest,

CERTIFICATE OF SERVICE

I, Samuel R. Howell, counsel for appellee Interstate Commerce Commission, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 11th day of August, 1955, I served copies of the foregoing Motion to Affirm on the parties to this proceeding as follows:

1. On appellants, by mailing copies in duly addressed envelopes, with air-mail postage prepaid, to its attorneys of record, as follows:

Nuel D. Belnap, Esq.,
One North La Salle Street,
Chicago, Ill.

Kenneth McAuliffe, Esq.,
233 Broadway,
New York 7, N.Y.

and with first-class postage prepaid to:

Donald Macleay, Esq.,
1625 K St., N.W.,
Washington 6, D. C.

2. On the United States of America, by mailing copies in duly addressed envelope with first-class postage prepaid to:

Honorable Simon E. Sobeloff,
Solicitor General of the United States,
Department of Justice,
Washington 25, D. C.

---

after full hearing upon complaint or upon its own intiative without complaint, establish through routes * * * and joint rates * * *.

Section 307(d) contains an identical provision.

3. On the intervening railroad defendants, by mailing copies in duly addressed envelopes, with air-mail postage prepaid, to their attorneys of record, as follows:

John A. Daily, Esq.,
1225 La Salle Street Station,
Chicago 5, Ill.

Palmer C. Hutchenson, Jr., Esq.,
Room 1720 Niels Esperson Bldg.,
Houston, Texas.

This, the 11th day of August, 1955.

SAMUEL R. HOWELL.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 233

DIXIE CARRIERS, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO MOTION TO AFFIRM

STATEMENT

This appeal, filed by various water carriers, seeks review of a judgment of a three-judge district court affirming an order of the Interstate Commerce Commission. The United States, although it is an appellee in these proceedings, believes that the case presents an issue of importance under the Interstate Commerce Act and that probable jurisdiction should be noted. The pertinent facts are as follows:

Sulphur is mined in large quantities near Galveston, Texas and can be shipped from the mine

to Danville, Illinois either by rail or by rail and barge. The rail-barge route is by rail from the mine to Galveston, and by barge from Galveston to East St. Louis, Illinois, and then by rail to Danville. The total charge for such movement is $9.77 per ton, consisting of rail and loading charges of $1.50 from the mines to Galveston, the barge rate of $5.32 from Galveston to East St. Louis, and the local rail rate of $2.95 from East St. Louis to Danville. Although the total of the local rates for all-rail shipments from the mines to Danville is $11.70,[1] the railroads have established a joint all-rail rate of $9.184. Since 1951, when a contract barge carrier discontinued operations, all sulphur has moved over the all-rail route.

Appellants, common carriers by water, operate between Galveston and East St. Louis. In December 1950 they filed a complaint with the Interstate Commerce Commission alleging that the existing rail-barge rates on sulphur were unreasonable and that the refusal of the railroads to establish through rail-barge routes and joint rates on the traffic discriminated against the barges as connecting carriers, in violation of Sections 1, 3(4), and 307(d) of the Interstate Commerce Act.[2] Appellants re-

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[1] The local rail rate is $8.75 from the mines to East St. Louis, and $2.95 from the latter to Danville.

[2] Section 1(4) of the Act requires rail carriers to establish "reasonable through routes" with water carriers, and "just and reasonable rates" applicable thereto. Section 3(4) provides that all rail carriers "shall not discriminate in their rates, fares, and charges between connecting lines * * *," which are defined to include "any common carrier by water sub-

quested the Commission to establish a through rail-barge route from Galveston to Danville and a joint rate, which they suggested be fixed at $7.67. The cost for rail-barge-rail shipments from the mine to Danville under that proposed rate would be $9.17, as against the all-rail rate of $9.184.

After hearing, the Commission (three commissioners dissenting) dismissed the complaint. *American Barge Line Co.* v. *Chicago and Eastern Illinois R. R. Co.*, 291 I.C.C. 422 (affirming 287 I.C.C. 403). The Commission held (p. 423) that since no shipper had shown any interest in the rate sought and the all-rail rate was on a depressed basis, it was not "necessary or desirable in the public interest" to establish through routes and joint rates. It further held (*ibid.*) that the record afforded no support for finding that the present combination rail-barge rate was unreasonable. The Commission also rejected the claim of discrimination. Declaring that this claim rests on the fact that "the separately established rate paid by the shipper on ex-barge traffic beyond East St. Louis is greater

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ject to part III". Section 307(d) directs the Commission, whenever it deems it "necessary or desirable in the public interest" to establish through routes and joint rates "applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad * * * and the divisions of such rates * * *, and the terms and conditions upon which such through routes shall be operated." Section 307(d) further directs the Commission, in the case of a through route between rail and water carriers, to prescribe such "reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carriers by water."

than the unpublished division of a joint through all-rail rate received by the rail carrier for the transportation beyond East St. Louis on ex-rail traffic moving from the same origin to the same destination," it ruled that divisions of joint rates are not "rates" or "charges" within the meaning of Section 3(4) (p. 424).

On appeal, a three-judge district court upheld the Commission's order. The court held (1) that the Commission's findings were adequate and were supported by the evidence, and (2) that, on its own independent consideration of the record, the court had concluded that establishment of the proposed routes and rates would not be in the public interest, and that the existing rates were not discriminatory.

DISCUSSION

The Commission's findings in this case show that although the combination all-rail rate on sulphur is substantially *higher* than the rail-barge rate, the railroads have established a joint all-rail rate which is substantially *lower* than the rail-barge rate, but have refused to establish a comparable rail-barge through route and joint rate. The result has been to eliminate the barges from carrying the traffic. The important issue presented by this appeal is whether under such circumstances the Interstate Commerce Act requires the Commission to establish through rail-barge routes and joint rates in order to effectuate the National

Transportation Policy that the Act is to be administered so as to preserve the "inherent advantages" of each form of transportation.[3] We believe that this Court's decision in *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, requires an affirmative answer.

In the *Mechling* case, the Court invalidated a Commission order which approved higher rail rates for the transportation of grain east from Chicago if it arrived at Chicago by barge rather than by rail or lake steamer. The grain moved on through bills of lading from the west to eastern destinations, and the charge for the movement from Chicago to the east was a "proportional" rate which was lower than the "local" rate for shipments to the east which originated in Chicago.[4] The Court

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[3] The question whether a rail carrier's refusal to establish reasonable divisions with one of two connecting carriers may constitute discrimination prohibited by Section 3(4) arises only if through routes and joint rates already exist. Here such routes and rates do not exist between the barge and rail carriers. Moreover, it is clear that the source of appellants' competitive injury is not the disparity between the division of the joint all rail rate and the local rail rate which the barge traffic pays, but the fact that there is a joint all-rail rate which is substantially lower than the total of the local rail rates.

Similarly, the question of what is the "reasonable differential" which Section 307(d) requires the Commission to prescribe between the all-rail and the rail-barge through route arises only after through routes have been established.

[4] The "proportional" rate previously had been the same for ex-barge and ex-rail grain.

held (p. 577) that the pertinent provisions of the Interstate Commerce Act [5] "flatly forbid the Commission to approve barge rates or barge-rail rates which do not preserve intact the inherent advantages of cheaper water transportation, but discriminate against water carriers and the goods they transport," and that Congress "has declared in unmistakable terms that the 'inherent advantage' of the lower cost of barge carriage as compared with that of railroads must be passed on to those who ship by barge" (p. 579). It rejected the Commission's "assumption that the congressional prohibitions of railroad rate discriminations against water carriers were not applicable to such discriminations if accomplished by through rates" (p. 577), since "Congress left the Commission no discretionary power to approve any type of rates which would reduce the 'inherent advantage' of barge transportation in whole or in part" (p. 579).

It thus appears that the *Mechling* case stands for the broad proposition that the Act outlaws any rate system which prevents shippers from obtaining the benefits of the "inherent advantage" of barge transportation, namely, its lower cost. It would seem immaterial whether such discrimina-

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[5] These provisions include, in addition to the sections cited *supra*, note 2, the National Transportation Policy, which declares that the Interstate Commerce Act is to be administered so as to "recognize and preserve the inherent advantages of each" "mode[s] of transportation."

tion results from the establishment of a higher proportional rate on ex-barge than on ex-rail traffic (as in the *Mechling* case), or from the failure of rail carriers to establish through routes with a connecting barge line while at the same time maintaining such routes with a connecting rail carrier in competition with the barge line (as in the case at bar). For Congress gave the Commission no power to approve "*any type of rates* which would reduce the 'inherent advantages' of barge transportation" (emphasis added).

In sanctioning the rail-barge rate system here involved, the Commission has seemingly departed from the principle stated in *Mechling*, that the Act "must be administered as to preserve, not eliminate or reduce the disparity" between rail-barge rates and local rail rates which the "inherent cheapness of the barge leg of the through route produces" (330 U.S. at 580). The rail-barge-rail combination rate of $9.77 is approximately $2.00 less than the all-rail combination rate of $11.70, and this differential presumably reflects the lower cost of the barge segment of the journey. But the railroads' refusal to establish a joint rail-barge rate, while continuing to maintain joint all-rail rates of $9.18, has effectively eliminated the barges as a competitive factor on this traffic. In short, the practical effect of the Commission's refusal to prescribe through rail-barge routes and joint rates has been to deny "to those who ship by barge"

"the 'inherent advantage' of the lower cost of barge carriage" (*id.*, p. 579).

Section 307(d) of the Act directs the Commission, whenever it is "necessary or desirable in the public interest," to establish through routes and joint rates "applicable to the transportation of passengers or property by common carriers by water * * * and carriers by railroad * * * ." We believe that it was "necessary or desirable in the public interest" to establish a through rail-barge route and a joint rate in this case because such route and rate are required to "preserve the 'inherent advantages' " of water transportation (National Transportation Policy). Moreover, we think that Section 307(d) required the Commission to fix such joint rail-barge rate so that the differential between it and the all-rail rate would fully reflect the lower cost of the barge segment of the journey. Cf. *Alabama G.S.R. Co.* v. *United States*, 340 U.S. 216. While the amount of such differential is, in the first instance, for the Commission to determine, it appears, at the least, that the rail-barge-rail rate should be no higher than all-rail transportation. Finally, we note that the rail carriers' refusal to establish through routes and joint rates with the barge lines may result in discrimination in "rates" and "charges" in violation of Section 3(4), whether or not a "division" of a rate is itself a "rate" or "charge" within that section.

We submit that, for the foregoing reasons, the

motions to affirm should be denied and probable jurisdiction of the appeal should be noted.[6]

Respectfully submitted,

SIMON E. SOBELOFF,
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STANLEY N. BARNES,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
FREDERICA BRENNEMAN,
Attorneys.

SEPTEMBER, 1955.

[6] If probable jurisdiction is noted the United States, which took a neutral position in the district court, intends to participate in the appeal in support of appellants.

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SUPREME COURT, U.S.

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No. 233

In the Supreme Court of the United States

OCTOBER TERM, 1955

DIXIE CARRIERS, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES

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v.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES

Appellee United States of America is of the view that the decision below, upholding an order of the Interstate Commerce Commission, is erroneous. It therefore submits this brief in support of reversal.

OPINION BELOW

The opinion of the district court (R. 45) is reported in 129 F. Supp. 28. The report of Division 3 of the Interstate Commerce Commission (R. 21) appears in 287 I. C. C. 403, and the report of the full Commission on reconsideration (R. 29) appears in 291 I. C. C. 422.

JURISDICTION

The judgment of the district court was entered on February 16, 1955 (R. 55), and a timely motion for new trial (R. 56) was denied on March 28, 1955 (R. 60). Notice of appeal was filed on May 17, 1955 (R. 1), and probable jurisdiction was noted on October 10, 1955 (R. 152). The jurisdiction of this Court to review this decision by direct appeal is conferred by 28 U. S. C, 1253 and 2101 (b).

QUESTIONS PRESENTED

The combination all-rail rate on sulphur from mines near Galveston, Texas, to Danville, Illinois, is substantially *higher* than the combination rail-barge rate for the same journey. The railroads, however, maintain a joint all-rail rate which is substantially *lower* than the rail-barge combination rate, but have refused to establish a comparable rail-barge through route and joint rate. The result has been to eliminate the barges from carrying this traffic. The questions presented are:

1. Whether, under such circumstances, the Interstate Commerce Act requires the Commission to establish through routes and joint rates for rail-barge transportation, in order to effectuate the National Transportation Policy that the Act be administered so as to preserve the "inherent advantages" of each form of transportation.

2. Whether the railroads' refusal to establish joint rates with the connecting barge lines, while maintaining such rates with the connecting rail lines, constitutes a discrimination in rates between connecting lines prohibited by Section 3 (4) of the Act.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act, 24 Stat. 379, 54 Stat. 898, as amended, 49 U. S. C. 1. *et seq.*, are as follows:

THE NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate

to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy. [49 U. S. C. preceding Sec. 1]

Section 1 (4): * * * it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. * * * [49 U. S. C. 1 (4)]

Section 3 (4): All carriers subject to the provisions of this part * * * shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III. [49 U. S. C. 3 (4)]

Section 15 (3): The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and

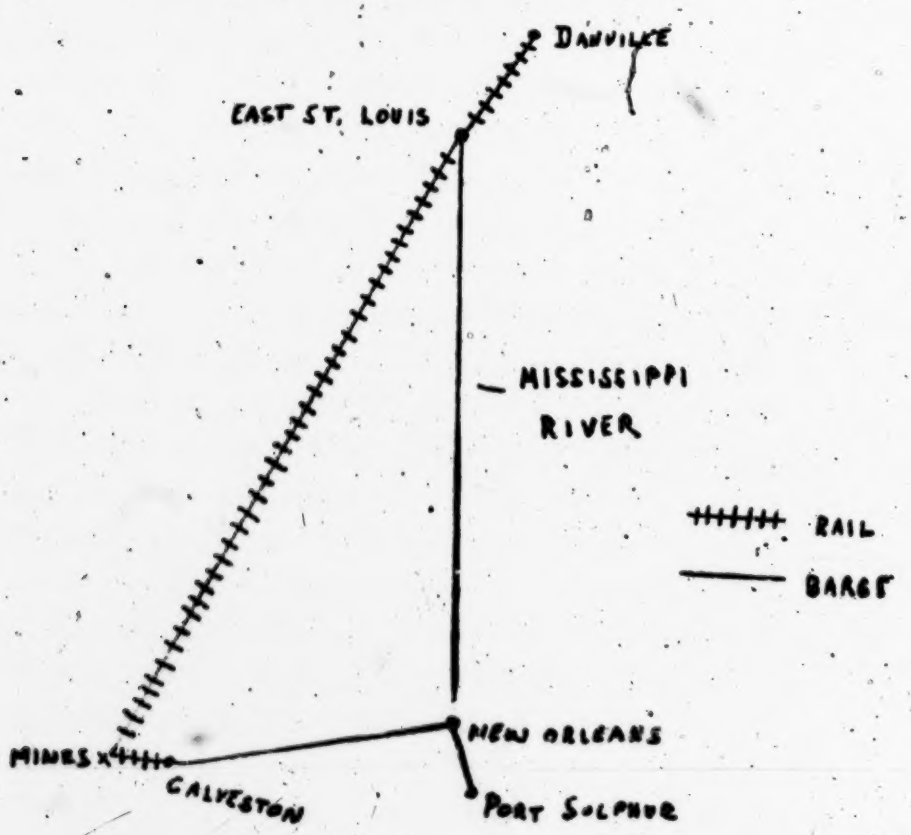
joint rates, fares, or charges, applicable to the transportation of passengers or property * * * by carriers by railroad subject to this part and common carriers by water subject to part III * * * and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. * * * [49 U. S. C. 15 (3)]

Section 307 (d): The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water. * * * [49 U. S. C. 907 (d)]

STATEMENT

This is a direct appeal from the judgment of a three-judge district court affirming an order of the Interstate Commerce Commission. The Commission's order refused to prescribe through routes and joint rates between the appellant water carriers and connecting railroads for sulphur moving from Galveston, Texas, to Danville, Illinois.

The following sketch shows the routes involved in this case (see map, R. 114A):



The facts pertinent to the issues before this Court are as follows:

Sulphur mined in the Galveston area can be shipped to Danville (where a large user of sulphur is located, R. 93) either by rail or by rail and barge (R. 23, 79–80). The rail-barge route is by rail from the sulphur mines to Galveston, by barge from Galveston (via New Orleans) to East St. Louis, Illinois, and then by rail to Danville (R. 23).[1] The total charge for such movement is $9.77 per ton, consisting of rail and loading charges of $1.50 from the mines to Galveston, the barge rate of $5.32 from Galveston to East St. Louis, and the local rail rate of $2.95 from East St. Louis to Danville (R. 23, 84–89, 103–104).

The total of the local rates for all-rail shipments from the mines to Danville is $11.68,[2] which is $1.91 higher than the combination rail-barge rate. The railroads, however, have established a joint all-rail rate of $9.184, which is $2.52 below the combination all-rail rate and .59 below the combination rail-barge rate. During the last six months of 1950, the "preponderance" of sul-

[1] Appellants Dixie Carriers, Inc. and Coyle Lines, Incorporated, provide barge service on the intercoastal canal between Galveston and New Orleans, and appellants Federal Barge Lines, Inc., and American Barge Line Company provide barge service on the Mississippi River between New Orleans and East St. Louis (R. 23). The two groups of carriers join in providing through barge service at joint rates between Galveston and East St. Louis (*ibid.*).

[2] The local rail rate is $8.736 from the mines to East St. Louis, and $2.95 from the latter to Danville (R. 104).

phur traffic from Galveston to Danville moved by rail and barge via a contract barge carrier (R. 24). Since 1951, however, when the contract carrier discontinued operations, all sulphur from Galveston to Danville has moved over the all-rail route (R. 30, 82). Approximately 20,000 tons of sulphur are shipped annually over this route (R. 30, 93).[3]

At the request of a shipper, appellants in 1950 requested the Danville railroads to establish a joint rail-barge rate of $7.67 on sulphur from Galveston to Danville (R. 78, 91–92),[4] but the railroads refused to do so (R. 79). Appellants then filed a complaint with the Interstate Commerce Commission, alleging that the existing rail-barge rates on sulphur were excessive and unreasonable, that it was necessary and desirable in the public interest to establish through rail-

[3] Sulphur is also mined at Port Sulphur, Louisiana, a point approximately 60 miles south of New Orleans. The Danville railroads have joint rates with both the rail carriers and the barge carriers operating out of Port Sulphur. The Port Sulphur-Danville all-rail rate is $9.184, the same as the Galveston-Danville rate (R. 124). The joint barge-rail rate from Port Sulphur to Danville is $6.66 (R. 77–78, 80). The Danville railroads receive a division of $2.26 of the latter rate, as against the local rate of $2.95 (R. 82).

[4] This rate was determined by adding $1.01 to the $6.66 joint rail-barge rate from Port Sulphur to Danville. The $1.01 represents the differential by which barge rates on sulphur from Galveston mines to various points throughout the country traditionally have exceeded such rates from Port Sulphur mines to the same points (R. 78, 92). See *supra*, n. 3.

barge routes and joint rates with reasonable differentials below the all-rail rates, and that the refusal of the railroads to establish such joint rates discriminated against the barges as connecting carriers, in violation of Sections 1 (3), 3 (4) and 307 (d) of the Interstate Commerce Act (R. 62–64). Appellants requested the Commission to establish a through rail-barge route from Galveston to Danville and a joint rate, which they suggested be fixed at $7.67. (See *supra*, n. 4.) They proposed to give the Danville railroads $2.26 as a division of that rate (R. 24, 83), which is the same division the railroads receive of the joint rail-barge rate from Port Sulphur to Danville (see *supra*, n. 3), and appears to be the same as they receive of the all-rail Galveston-Danville rate (R. 129). Under the proposed rate, the cost of rail-barge shipments from the mines to Danville would be $9.17, as against the all-rail rate of $9.184 (R. 81). While ordinarily such a slight differential would not enable the barge carriers to get any traffic, a shipper told appellants that, because of the absorption of part of the barge rate by the Galveston sulphur producers, they would get some business at that rate (R. 81–82, 93, 146).

After hearing the Commission (three commissioners dissenting) dismissed the complaint (R. 29–35, affirming Division 3, R. 22–28). The Commission held (R. 30–31) that since no shipper had evidenced an interest in the rate sought and

since the all-rail rate was on a depressed basis, it could not find that "the public interest requires" the establishment of the joint barge-rail rate sought. It stated (R. 30) that there was "no evidence" to show that a differential between the present joint all-rail rate and the proposed joint rail-barge rate was "required to remove the alleged discrimination against barge lines and to result in rates that would be consistent with the national transportation policy to preserve the inherent advantages of all modes of transportation." The Commission further held (R. 31) that the record afforded no support for the finding that the present combination rail-barge rate was unreasonable. The Commission also rejected the claim of discrimination. Declaring that this claim rests on the fact that "the separately established rate paid by the shipper on ex-barge traffic beyond East St. Louis is greater than the unpublished division of a joint through all-rail rate received by the rail carriers for the transportation beyond East St. Louis on ex-rail traffic moving from the same origin to the same destination," it ruled that divisions of joint rates are not "rates" or "charges" within the meaning of Section 3 (4) (R. 31–32).

On appeal, a three-judge district court upheld the Commission's order dismissing the complaint (R. 45–55). The court held (1) that the Commission's findings were adequate and were supported by the evidence (R. 50), and (2) that, on

its own independent consideration of the record, the court had concluded that establishment of the proposed routes and rates would not be in the public interest, and that the existing rates were not discriminatory (R. 50–52).

SUMMARY OF ARGUMENT

I. The Transportation Act of 1940, which brought water carriers under the general regulatory power of the Interstate Commerce Commission, was the culmination of a long struggle in Congress to compel the railroads to establish through routes and joint rates with connecting barge lines. Without joint rail-barge rates under which the total transportation cost is sufficiently cheaper than all-rail transportation to offset the slower service provided on the barge leg of the journey, the barges will be unable to participate effectively in the national transportation system.

The recent history of rail-barge relationships in this country shows repeated Congressional endeavors to insure joint rail-barge rates which would foster the development of adequate water service. In a series of acts beginning in 1920, Congress directed the Government officials who had charge of operating the federal barge service to establish proper joint rail-barge rates. The final step was the Transportation Act of 1940 which required the Commission, *inter alia*, whenever "necessary or desirable in the public interest," to establish through routes and joint rates

between rail and water carriers, and to prescribe reasonable differentials between such rail-barge rates and all-rail rates.

The 1940 Act also contains a number of provisions designed to prevent the Commission from administering the Act so as to favor railroads over water carriers. The Act's declaration of the National Transportation Policy requires the Commission to administer that Act so as to "recognize and preserve the inherent advantages" of "all modes of transportation" subject to the Act. A number of provisions were designed to preserve the inherent advantages of water transportation, including the amendment of Section 3 (4) to broaden the prohibition against railroads discriminating in "rates, fares, and charges between connecting lines" to include water carriers within the definition of connecting lines.

In *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, this Court interpreted those provisions as invalidating a Commission order which approved higher rail rates for the transportation of grain east from Chicago if it had arrived in Chicago by barge rather than by rail or lake steamer. The Court stated (p. 579) that Congress had "declared in unmistakable terms that the 'inherent advantage' of the lower cost of barge carriage as compared with that of railroads must be passed on to those who ship by barge," and had "left the Commission no discretionary power to approve any type of rates which

would reduce the 'inherent advantage' of barge transportation in whole or in part."

Although *Mechling* involved an attempt by the railroads to destroy the barges' "inherent advantage" by *raising* the cost of barge service, the same result could be achieved by *lowering* the cost of all-rail service to the rail-barge level. The legislative history of the 1940 Act shows that Congress also intended to prohibit that possibility. One obvious way in which the railroads can destroy the inherent advantage of barge transportation is by establishing joint rates with a connecting railroad while at the same time refusing to establish such rates with a connecting barge line which competes with the connecting railroad. By thus reducing the all-rail rate to a point equal to or below that of the combination rail-barge rate, the railroads will be able to freeze the barges out of the business—as was done in this case.

We submit that where the railroads' refusal to establish joint rail-barge rates would result in reducing the barges' "inherent advantage," the Commission is required to find that establishment of such rates is "necessary or desirable in the public interest" under Section 307 (d). In this case, the combination rail-barge rate on sulphur of ~~$1.68~~ 1.77 per ton is $1.91 less than the combination all-rail rate of ~~$3.77~~ 3.68, and shippers who would be willing to accept the slower barge service would obtain the benefit of the differential. By

maintaining a joint all-rail rate of $9.184, which is .59 below the rail-barge combination rate, the benefits of the lower cost of barge service have been denied to those who would ship by barge.

The reasons given by the Commission for concluding that establishment of joint rates was not in the public interest—that no shipper testified in support thereof, and that the all-rail rate is on a depressed basis—do not support its action. Where, as here, a joint rate is required to preserve the barges' inherent advantage, it is in the public interest to establish it whether or not shipper witnesses appear. Furthermore, a shipper had advised the barges that under their proposal they would share in the business. The all-rail rate was depressed only because it had been reduced to meet water competition, and the Commission cannot maintain the cost of barge transportation at an arbitrarily high level in order to protect competing railroads. If the barges are willing to carry the traffic at less than the railroads, Congress intended that they should be permitted to do so. Absent exceptional and unusual circumstances, which are not disclosed by this record, the Commission is required to prescribe through rail-barge routes and joint rates whenever their establishment is required to preserve the barges' "inherent advantage."

II. Section 3 (4) of the Act prohibits rail carriers from discriminating in their "rates, fares,

and charges between connecting lines," including water carriers. The Commission repeatedly has held that it is a violation of that provision for a railroad to refuse to establish joint rates with one of two connecting water carriers or with one of two connecting railroads, while maintaining such rates with the other. It is equally discriminatory for a railroad to refuse to establish such rates with a connecting barge line while maintaining them with a connecting railroad which competes with the barge line. Both are connecting carriers, and the economic advantage which a rail carrier gains when the competitor which is discriminated against is a barge line is just as great, if not greater, than when it is another railroad. The statutory prohibition is not restricted to rate discriminations between carriers engaged in the same form of transportation, but forbids discrimination between "all connecting lines."

Since the barge lines proposed to give the railroads the same division out of the proposed joint rail-barge rate which they now receive out of the all-rail rate, establishment of a joint rail-barge rate cannot prejudice them. The railroads have no proper concern with whether the sulphur has reached them by barge or by rail, and they cannot discriminate against the barges merely to protect connecting rail carriers from competition by connecting barge lines. The railroads' refusal to

establish joint rail-barge rates plainly was a discrimination in rates between connecting lines forbidden by Section 3 (4).

ARGUMENT

INTRODUCTION

The Transportation Act of 1940, 54 Stat. 898, which brought water carriers under the general regulatory powers of the Interstate Commerce Commission, was the culmination of a long struggle in Congress to compel the nation's railroads to establish through routes and joint rates with connecting barge lines. Barge transportation, although slower than rail, is also substantially cheaper, and thus is attractive to shippers to whom lower cost is more important than speed. Cf. *Alabama Great Southern Railroad Co.* v. *United States*, 340 U. S. 216, 223. However, since generally only one portion of an interstate journey can be made by barge, the traffic must be interchanged with connecting rail carriers, either at the beginning or at the end of the water trip, or at both points. Under such circumstances, effective participation by barge carriers in our national transportation system depends upon the existence of joint rail-barge rates which are sufficiently cheaper than all-rail transportation to offset the inferior service provided on the barge leg of the journey. For, absent such lower joint

rail-barge rates, the barges will be frozen out of the traffic.[5]

It is our contention that the various provisions of the Transportation Act of 1940 which deal with rail-barge relationships place upon the Commission a clear duty to prescribe through rail-barge routes and joint rates whenever such routes and rates are required to carry out the National Transportation Policy that the inherent advantage of barge transportation (its lower cost) is to be preserved. Although here the *combination* of local rail rates on sulphur from the Galveston mines to Danville is substantially *higher* than the combination of local rail and barge rates, the Danville railroads have established a *joint* all-rail rate which is substantially *lower* than the rail-barge combination rate, but have refused to establish a comparable joint rail-barge rate. As a result, the barges are unable to carry the traffic. We shall argue in Point I that joint rail-barge rates are required to carry out the National Transportation Policy, and that the Commission therefore was required to find under Section 307 (d) that establishment of such rates was "necessary or desirable in the public interest." In Point II, we shall urge that the railroads' refusal to establish joint rates with connecting barges, while maintaining

[5] Thus, an official of one of the appellants testified that there has to be a "substantial difference" between the all-rail rate and the rail-barge rate "in order for the barge carriers to participate in the traffic" (R. 81).

such rates with connecting railroads, constituted a discrimination in rates between connecting lines which is prohibited by Section 3 (4) of the Act. Either ground is sufficient for reversal.

I

SECTION 307 (d) REQUIRED THE COMMISSION TO PRESCRIBE JOINT RAIL-BARGE RATES IN ORDER TO EFFECTUATE THE NATIONAL TRANSPORTATION POLICY THAT THE ACT IS TO BE ADMINISTERED SO AS TO PRESERVE THE "INHERENT ADVANTAGES" OF EACH FORM OF TRANSPORTATION.

A brief summary of the recent history of rail-barge relationships in this country is necessary to an understanding of the statutory issues involved.[6]

By 1918, the movement of freight by water along the Mississippi River and its tributaries had almost disappeared. 270 I. C. C. 594. In 1918 Congress, in attempting to alleviate the war-time transportation shortage, sought to revive such barge service through creation of a federally owned and operated barge-line system. *Ibid.* In Section 6 of the Federal Control Act of 1918 (40 Stat. 451, 455), the President was authorized to spend out of a $500,000,000 appropriation

[6] The history is set forth in considerable detail in the Commission's report in *Rail and Barge Joint Rates*, 270 I. C. C. 591, 594–601, 606–613. The discussion in the text is taken largely from that report. See also the Government's brief in *Alabama Great Southern Railroad Co.* v. *United States*, 340 U. S. 216, Nos. 45–48, October Term, 1950, pp. 5–11.

"such an amount as he may deem necessary or desirable for the utilization and operation of canals, or for the purchase, construction, or utilization and operation of boats, barges, tugs, and other transportation facilities on the inland, canal, and coastwise waterways * * *." The Railroad Administration inaugurated barge service on the Mississippi late in 1918, and the Director General of Railroads published joint rail-barge rates to and from inland points which were lower than the combination of the local rail and barge rates. 270 I. C. C. 597–598.

When wartime control over railroad transportation facilities was terminated by the Transportation Act of 1920, 41 Stat. 456, the experiment of federal barge operation was continued. That Act declared it to be the policy of Congress "to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation." Section 500, 41 Stat. 499. The water transportation facilities which the United States had acquired were turned over to the Secretary of War with directions to continue their operation (Section 201, 41 Stat. 458). The Secretary was directed (Section 500, 41 Stat. 499) to investigate "the subject of water terminals, both for inland waterway traffic and for through traffic by water and rail * * * with a

view to devising the types most appropriate for different locations, and for *the more expeditious and economical transfer or interchange of passengers or property between carriers by water and carriers by rail* * * * [and] the existing status of water transportation upon the different inland waterways of the country, with a view to determining * * * *whether the water carriers utilizing such waterways are interchanging traffic with the railroads* * * *." (Emphasis supplied.)

In 1924 the Government's Mississippi River barge operations, which were carried on under the name of "Federal Barge Lines," were turned over to Inland Waterways Corporation, a Government corporation created for that purpose. Inland Waterways Corporation Act, 43 Stat. 360. The Act required the Corporation to continue to carry out the policies laid down in the Transportation Act of 1920.[7]

From 1920 to 1927 efforts were made by Federal Barge Lines to establish through routes and joint rates both by voluntary arrangements with rail carriers and by proceedings before the Commission (270 I. C. C. 598–599). There was much dissatisfaction upon the part of advocates of water transportation with the result of these efforts, and Congress was "urged to provide some

[7] Inland Waterways Corporation continued to operate the federal barge service until 1953, when it sold the operating rights and properties to appellant Federal Barge Lines, Inc. *Federal Barge Lines, Inc., Purchase*, 285 I. C. C. 439.

method of overcoming the reluctance of hostile railroads to establish joint rates with barge lines other than by resort to complaint and hearing under the Interstate Commerce Act" (*id.*, p. 599). In 1928, in response to this appeal, Congress passed the Denison Act (Act of May 29, 1928, 45 Stat. 978). That Act declared it to be the congressional policy to continue the federal barge transportation services until, *inter alia*, "terminal facilities shall have been provided * * * reasonably adequate for joint rail and water service" and "there shall have been published and filed * * * such joint tariffs with rail carriers *as shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers*" (45 Stat. 979). (Emphasis supplied.) The Act required the Commission to grant certificates of public convenience and necessity to barge carriers, and to direct all connecting common carriers and their connections to join with certificated water carriers in through routes and joint rates. The Commission also was directed to "fix reasonable minimum differentials between all rail rates and joint rates in connection with said water service" (45 Stat. 980). These provisions "were enacted by Congress in an avowed effort to bring about cooperation on the part of the rail carriers with the water carriers." *United States* v. *Illinois Central R. Co.*, 291 U. S. 457, 462.

The final legislative step was the passage of the Transportation Act of 1940, 54 Stat. 898. That Act brought water carriers under the general regulatory scheme of the Interstate Commerce Act. The sections of the Denison Act providing for establishment of joint through routes and rate differentials were replaced by the present Section 307 (d) of the Interstate Commerce Act. That Section directs the Commission, "whenever deemed by it to be necessary or desirable in the public interest," to establish through routes and joint rates between common carriers by water, or between such carriers and carriers by rail, and, in the case of through rail-barge routes, to prescribe "such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water." At the same time, Congress extended the Commission's powers and duties under Section 15 (3) to establish through routes and joint rates between rail carriers to cover such routes and rates between "carriers by railroad * * * and common carriers by water * * *."

In sum, the provisions requiring the Commission to establish joint rail-barge rates in the public interest which Congress added to the Interstate Commerce Act in 1940 were written against the background of a long history of congressional endeavor to insure joint rail-barge rates which would foster the development of adequate rail-barge service.

Another factor which significantly influenced Congress in prescribing the Commission's powers and duties with respect to water transportation was the fear, expressed by proponents of such transportation, that the Commission might exercise its regulatory powers so as to favor the railroads in order to enable them "better to compete with inherently cheaper water transportation." *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, 575.[8] As this Court there pointed out (*ibid.*), the legislative history of the 1940 Act shows that "[t]hese opponents were repeatedly assured by sponsors of the 1940 Act who advocated Commission regulation of water transportation that the questioned legislation unequivocally required the Commission to fix rates which would preserve for shippers the inherent advantages of barge transportation: lower cost of equipment, operation, and therefore service."[9]

The 1940 Act contains a number of provisions whose "prime purpose * * * is to protect the water carrier's natural advantages." *Id.*, p. 576. The Act's declaration of the National Transportation Policy requires the Commission to admin-

[8] Proponents of water transportation had accused the Commission of pro-railroad bias during the hearings on the 1940 Act. See *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671, 698 (dissenting opinion of Mr. Justice Black).

[9] The legislative history is fully set forth in the brief of the United States in that case, No. 72, October Term, 1946, pp. 16–26.

ister the Act so as to "recognize and preserve the inherent advantages" of "all modes of transportation subject to * * * this Act." In order to preserve the inherent advantages of water transportation, Congress provided in Section 305 (c) that differences in rates and practices of a water carrier in respect to water transportation from those of a rail carrier with respect to rail transportation shall not constitute "unjust discrimination" or an "unfair or destructive competitive practice." Section 307 (f), requiring the Commission, in fixing rates, to consider "the effect of rates upon the movement of traffic by the * * * carriers for which the rates are prescribed," emphasized that the Commission must consider in fixing rates "* * * the need, in the public interest, of adequate and efficient water transportation service at the lowest cost consistent with the furnishing of such service * * *." Furthermore, Section 3 (4) of the Act, which forbade carriers to "discriminate in their rates, fares, and charges between * * * connecting lines," 41 Stat. 479, was amended by the 1940 Act specifically to include water carriers, such as appellants, within the definition of connecting carriers. 54 Stat. 898, 903–904, 49 U. S. C. 3 (4). By these provisions, Congress "has declared in unmistakable terms that the 'inherent advantage' of the lower cost of barge carriage as compared with that of railroads must be passed on to those who ship by barge." *Mechling* case, *supra*, p. 579.

In the *Mechling* case this Court interpreted those provisions as invalidating a Commission order which, by permitting discriminatory rate increases on barge traffic, would have denied shippers the inherent advantage of the lower cost of water transportation. The order approved higher rail rates for the transportation of grain east from Chicago if it arrived at Chicago by barge rather than by rail or lake steamer. The grain was reshipped from Chicago to the east under a "proportional" rate which was lower than the "local" rate for shipments to the east which originated in Chicago.[10] The Court held (p. 577) that the pertinent provisions of the Interstate Commerce Act "flatly forbid the Commission to approve barge rates or barge-rail rates which do not preserve intact the inherent advantages of cheaper water transportation, but discriminate against water carriers and the goods they transport," and that Congress "has declared in unmistakable terms that the 'inheren advantage' of the lower cost of barge carriage as ompared with that of railroads must be passed on to those who ship by barge" (p. 579). It rejected the Commission's "assumption that the congressional prohibitions of railroad rate discriminations against water carriers were not applicable to such discriminations if accomplished by through rates" (p. 577), since "Congress left the Commission no

[10] The proportional rate previously had been the same for ex-barge and ex-rail grain.

discretionary power to approve any type of rates which would reduce the 'inherent advantage' of barge transportation in whole or in part" (p. 579).

In the *Mechling* case, the railroads attempted to destroy the "inherent advantage" of water transportation by *raising* the cost of barge-rail transportation to that of all-rail service.[11] But the same result could be achieved by *reducing* the cost of all-rail service down to the level of the barge-rail rates. That Congress was aware of this possibility, and also intended to prohibit it, is shown by the following colloquy during the debate on the floor of the Senate between Senator Wheeler, who was in charge of the bill, and Senator Norris (84 Cong. Rec. 5874):

> Mr. NORRIS. Suppose, however, this bill should become a law, and an article of freight were to be transported which admittedly could be carried by water better than by railroad, and suppose the railroad should undertake to reduce its rate down to the water rate: Would there be anything in the law to prevent the railroad from doing that?
>
> Mr. WHEELER. Of course there would be.
>
> Mr. NORRIS. Disastrous rates can be brought about by reducing them just as

[11] Cf. *Tennessee Valley Authority* v. *United States*, 96 F. Supp. 409 (N. D. Ala.), where the court, in reliance on *Mechling*, set aside a Commission order permitting railroads to make higher charges for switching services on ex-barge traffic than on ex-rail traffic.

well as by increasing them, as a matter of fact.

Mr. WHEELER. Exactly.

Mr. NORRIS. And the water carrier ought to be protected on the freight that ought to be carried by water rather than on the railroad.

Mr. WHEELER. It would be absolutely protected under this measure.

Mr. NORRIS. That is what I want to see done.

Mr. WHEELER. There is not any question about it. Under the rate-making provision and under the other provisions I have read, there is not any question about it.

One obvious way by which railroads can destroy the "inherent advantages" of barge transportation is through establishing joint rates with a connecting rail carrier while at the same time refusing to establish such rates with a connecting barge carrier which competes with the connecting railroad. If, as in this case, the railroads fix a joint all-rail rate which is substantially lower than the combination rail-barge rate between the same points, the inevitable consequence will be to freeze the barges out of the traffic.[12] The 1940 Act was intended not only to preserve "the inherent advantages of each mode of transportation," but also to "eliminate destructive competition * * * between or among the different forms of carriage." *Eastern-Central Motor Carriers Association* v.

[12] See *supra*, n. 5.

United States, 321 U. S. 194, 206. Indeed, since barge transportation frequently, if not usually, covers only one segment of the journey, the failure of the railroads to establish non-discriminatory joint rates with barges could seriously impede the development and preservation of barge service as a vital component of "a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense" (National Transportation Policy).

Section 307 (d) directs the Commission, "whenever deemed by it to be necessary or desirable in the public interest," to establish through routes and joint rates applicable to the transportation of passengers or property by common carriers by water and carriers by railroad. The National Transportation Policy, which is the "Commission's guide to 'the public interest'" (*McLean Trucking Co.* v. *United States*, 321 U. S. 67, 82), prohibits the Commission from approving "any type of rates which would reduce the 'inherent advantage' of barge transportation in whole or in part" (*Mechling* case, *supra*, p. 579). By refusing to require the Danville railroads to establish joint rates with appellants, the Commission has sanctioned a rate structure which completely eliminates the barges from carrying sulphur from the Galveston mines to Danville. Under such circumstances, we submit, the Commission was re-

quired to find that it was "necessary or desirable in the public interest" that joint barge-rail rates should be established, and reasonable differentials fixed, in order that appellants may participate in this traffic upon fair terms.

Absent the joint all-rail rate, the rail-barge combination rate for sulphur would be $1.91 per ton less than the all-rail combination rate between the same points. ($9.77 as against $11.68, see *supra*, p. 7). This differential reflects the lower cost of the barge leg of the journey, and shippers who would be willing to accept the slower barge service would gain the advantage of this lower cost. The joint all-rail rate of $9.184, however, is .59 below the combination rail-barge rate.[13] The result of the railroads' refusal to establish a comparable joint rate with appellants has been that although the barge leg of the journey costs substantially less than the rail leg, the barges have been unable to participate in this traffic and "those who ship by barge" have been denied "the 'inherent advantage' of the lower cost of barge carriage" (*Mechling* case, *supra*, p. 579).[14] By refusing to prescribe joint

[13] Contrary to the Commission's view (R. 30), the proper comparison is between the rail-barge rate from the mines of $9.77 and the all-rail rate therefrom of $9.184, and not between the latter figure and the rail-barge rate from Galveston of $8.27. It costs $1.50 to transport the sulphur from the mines to Galveston and to load it on the barges there.

[14] Cf. *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612, where the Court, in upholding a Commission order directing railroads to interchange cars with Seatrain Lines, the only

rail-barge rates under such circumstances, the Commission has failed to effectuate the congressional policy that the Act "must be so administered as to preserve, not eliminate or reduce the disparity" between rail-barge rates and all-rail rates which the "inherent cheapness of the barge leg of the through route produces" (*id.*, p. 580).

The Commission's holding that establishment of a joint rail-barge rate was not required by the public interest rested on two grounds: (1) that no shipper had evidenced any interest in the rate sought, and (2) that the rate over the all-rail route which it was intended to meet is on a depressed basis (R. 31; see R. 26). But, as we have pointed out, the "public interest" standard in Section 307 (d) embodies the National Transportation Policy. Where, as here (*supra*, pp. 7–8), the effect of the railroads' refusal to establish joint rail-barge rates has been to deny shippers the benefit of low cost barge service, it is in the public interest to correct that situation, whether or not shipper witnesses appear and testify in support of the complaint. Indeed, Section 307 (d) provides for Commission action either upon complaint or upon its own initiative. Moreover, although no shipper appeared, the record shows that a shipper had advised appel-

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one of twelve connecting water carriers with which they refused to do so, pointed out (p. 617) that "[t]he 'inherent advantages of this service' would be lost to the public without railroad car interchange."

hants that under the proposed rail-barge rate they would share in the traffic (*supra*, p. 9).[15]

Nor does the fact that the all-rail joint rate is on a depressed basis justify the Commission's failure to find that prescription of a joint rail-barge rate is in the public interest. As the Commission recognized (R. 27, 32) and the railroads conceded (R. 96), the rail rate was depressed only because it had been reduced to meet water competition. The Commission cannot maintain barge rates at an arbitrarily high level in order to protect competing rail carriers. *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282. If the barges are willing to carry the traffic for less than the rails, Congress intended that they should be permitted to do so, and the Commission cannot deny shippers the inherent advantage of barge transportation by refusing to establish joint rail-barge rates which are necessary to enable the barges to carry the traffic. *Alabama Great Southern Railroad Co.* v. *United States*, 340 U. S. 216. If the rail rate is unreasonably low, the Commission has power under other sections of the Act to increase it to a proper level. But the Commission has no

[15] We also note that the Galveston Chamber of Commerce intervened in the proceedings in support of the complaint, alleging that the railroads' refusal to establish joint rail-barge rates would result in a diversion of sulphur traffic to all-rail routes and thereby adversely affect its interests (R. 64, 66).

power to sanction a rate structure which is designed to, and does, free the railroads from competition by other means of transportation.

We think that, absent exceptional and unusual circumstances—and no such circumstances are shown on this record—, the Commission is required to prescribe through rail-barge routes and joint rates whenever their establishment is necessary to preserve the barges' "inherent advantage." "Congress left the Commission no discretionary power to approve *any type of rates* which would reduce the 'inherent advantage' of barge transportation *in whole or in part*" (*Mechling* case, *supra*, p. 579). (Emphasis added.)

Section 307 (d) also requires the Commission to fix "reasonable differentials" between joint rail-barge rates and all-rail rates. Since the amount thereof is, in the first instance, for the Commission to determine, we do not discuss what would be a reasonable differential in this case. We do note, however, that the differential must be adequate to preserve the "inherent advantage" of barge transportation, *i. e.*, it must fully reflect and pass on to the shipper the lower cost of the barge segment of the journey.

II

THE RAILROADS' REFUSAL TO ESTABLISH JOINT RATES WITH THE BARGE LINES, WHILE MAINTAINING JOINT RATES WITH CONNECTING RAILROADS WHICH COMPETE WITH THE BARGE LINES, CONSTITUTED A DISCRIMINATION IN RATES BETWEEN CONNECTING LINES PROHIBITED BY SECTION 3 (4) OF THE INTERSTATE COMMERCE ACT

Section 3 (4) of the Act prohibits rail carriers from discriminating in their "rates, fares, and charges" between connecting lines, including water carriers. We think that the refusal of rail carriers to establish joint rates with connecting water carriers, while maintaining such rates with connecting rail carriers which compete with the water carriers, plainly constitutes a discrimination in "rates" between connecting lines which is prohibited by Section 3 (4).

The Commission repeatedly has held that the refusal of a rail carrier to establish joint rates with one connecting water carrier while maintaining such rates with another, or to establish joint rates with one connecting rail carrier while maintaining such rates with another, constitutes an illegal discrimination between connecting lines.[16]

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[16] Water carriers: *Decatur Navigation Company* v. *Louisville & Nashville RR. Co.*, 31 I. C. C. 281; *Pacific Navigation Co.* v. *Southern Pacific Co.*, 31 I. C. C. 472; *White Star Line* v. *NYC RR. Co.*, 83 I. C. C. 473. Rail carriers: *Ann Arbor RR. Co.* v. *B & O RR. Co.*, 136 I. C. C. 578; *Alabama, Tennessee & N. RR. Corp.* v. *Southern Ry. Co.*, 148 I. C. C. 708; *Denver & RGW R. Co.* v. *Union Pacific R. Co.*, 287 I. C. C.

We submit that it is equally discriminatory for a railroad to refuse to establish joint rates with a connecting barge line while maintaining such rates with a connecting railroad. Both are connecting carriers. The statutory prohibition is not limited to rate discriminations between carriers engaged in the same form of transportation, but forbids discrimination between all "connecting lines." The plain purpose of the provision is to prevent a rail carrier from giving one of its connecting carriers a competitive advantage over another.

A rail carrier gains the same unfair competitive advantage whether its competitor which is being discriminated against is another railroad or a water carrier. Indeed, the competitive advantage to a railroad may be even greater when the competing connecting carrier is a barge line which otherwise would be able to provide cheaper service to the public. In the light of the history of congressional concern over the railroads' refusal to establish joint rates with barge lines (see *supra*, pp. 18–22), we think that when Congress in 1940 amended Section 3 (4) specifically to include water carriers within the category of connecting carriers, it clearly intended to prohibit railroads which had joint rates with connecting rail carriers from discriminatorily refusing to establish joint rates with connecting water carriers.

611, 658–660, affirmed on this issue *sub nom. Union Pacific Railroad Company* v. *United States*, 132 F. Supp. 72 (D. Neb.), pending on appeal, Nos. 117–119, this Term.

Since appellants proposed to give the railroads a division out of the joint rail-barge rate identical to that which they now receive out of the joint all-rail rate (R. 129), there is no basis for the railroads' apprehension that establishment of the joint rate would require them to accept less than their "present revenue" of $2.95 on ex-barge traffic (R. 111; see R. 104). Indeed, inasmuch as no sulphur has moved at all by barge from the Galveston mines to Danville during the last five years, it is apparent that the railroads today are receiving no "present revenue" from this traffic. As long as the Danville railroads receive the same compensation for performing the same transportation service,[17] it cannot be material to them whether the antecedent journey of the goods which they transport was by rail or by barge. Cf. *Mechling* case, *supra*, pp. 577, 581–583. On the record in this case, the conclusion seems inescapable that the Danville railroads' refusal to establish joint rail-barge rates was dictated primarily by a desire to protect the connecting rail carriers from barge competition. The Act, however, does not give the railroads the life-or-death power over barge lines which would result if the decision whether to establish joint rail-barge rates lay solely in the railroads' discretion.

[17] The barge carriers proposed to absorb the cost of interchanging the sulphur with the railroads at East St. Louis (R. 84).

The Commission in its report did not even discuss whether the railroads' refusal to establish joint rates with appellants while maintaining such rates with the rail carriers constituted a discrimination in rates between connecting lines prohibited by Section 3 (4). Instead, it dismissed the issue of discrimination with the statement (R. 31, 32) that the basis of the alleged discrimination was the railroads' acceptance of a division on the ex-rail traffic which was less than the local rate which they charged for ex-barge traffic, and that a division of a joint rate is not a rate or charge under Section 3 (4). Appellants' complaint before the Commission (R. 63–64), however, was not thus limited, but specifically alleged that the railroads' refusal to establish joint rates with the barges, while maintaining such rates with other railroads, constituted a discrimination in rates and charges in violation of Section 3 (4), and appellants' counsel stated at oral argument before the Commission that he was continuing to press that contention (R. 126; see R. 147). The issue whether the railroads' refusal to establish joint rail-barge rates thus was squarely before the Commission, and the latter was required to decide it. And, as we have shown, refusal to establish such rates constituted a clear case of illegal discrimination.

Since we think that the railroads' refusal to establish joint rates with appellants constituted a discrimination in rates between connecting lines,

we find it unnecessary to reach appellants' question whether the railroads' acceptance of a division of the ex-rail rate which is less than the local rate charged for ex-barge traffic constitutes a discrimination in rates or charges prohibited by Section 3 (4).

CONCLUSION

The Commission erred in failing to establish through rail-barge routes and joint rates. The judgment of the district court upholding the Commission's order should be reversed, and the case remanded to the Commission for further appropriate proceedings.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1955

No. 233

DIXIE CARRIERS, INC., COYLE LINES, INCORPORATED, AMERICAN BARGE LINE COMPANY AND FEDERAL BARGE LINES, INC.,

Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE APPELLEES, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE APPELLEES, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.

Statutes and Regulations Involved

In setting out the statutes involved, the briefs filed by the appellants and the United States omit the following:

Section 15(6) of the Interstate Commerce Act [41 Stat. 486; 49 U. S. C. 15(6)]:

Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

Rules 20, 28, and 30(a) of the General Rules of Practice Before The Commission In Proceedings Under The Interstate Commerce Act And Related Acts [Federal Register, August 14, 1942, p. 6395, *et sequitur*, Title 49, Chapter I, Subchapter A, Part 1, sections 1.20, 1.28 and 1.30(a)].

Rule 20. Amendments. Leave to file amendments to any pleading will be allowed or denied as a matter of discretion.

Rule 28. Formal complaints: Allegations generally. A formal complaint should be so drawn as fully and completely to advise the parties defendant and the Commission in what respects the provisions of the act have been or are violated or will be violated, and should set forth briefly and in plain language the facts claimed to constitute such violation. If two or more sections or subsections of the act or requirements established pursuant thereto are alleged to be violated, the facts claimed to constitute violation of one section, subsection, or requirement should be stated separately from those claimed to constitute a violation of another section, subsection, or requirement whenever that can be done by reference or otherwise without undue repetition.

Rule 30. Formal complaints: Discrimination, preference, and prejudice.—(a) Generally.—A complaint that alleges the act is violated because of an undue or unreasonable preference or advantage, undue or unreasonable prejudice or disadvantage, or unjust discrimination should specify clearly the particular elements stated in the act as constituting such violation and the facts which complainant relies upon to establish it.

Questions Presented

In a preamble under "Questions Presented" at page 3 of their brief, the appellants state that:

> "The services rendered by the said railroads from East St. Louis to Danville on the ex-barge sulphur are the same as on the through all-rail sulphur."

This statement has no factual support in the record. The same error is repeated in appellants' Question No. 2.

In a preamble under "Questions Presented" at page 2 of its brief, the United States alleges that:

> "The result (of the joint all-rail rate and the absence of a comparable joint barge-rail rate) has been to eliminate the barges from carrying this traffic."

This is an unwarranted conclusion without factual support in the record.

Appellants' Question No. 1 was not raised in their complaint before the Commission. It was specifically disclaimed by counsel for the appellants (R. 148). Accordingly, appellants' attempt to inject the question here necessitates a preliminary inquiry:

> Whether appellants' Question No. 1 is properly before the Court.

A brief resume of the proceedings since the original complaint makes it quite clear that the other questions presented by the appellants are mere sham. Thus, while they filed the standard form of broad complaint in the lower court, the appellants' Motion For New Trial (R. 57) stated as follows:

> "Plaintiffs sought review of the Commission's decision *only* because it held *as a m[illegible] of law* that

divisions of through rates are *not* charges within the meaning of the section cited."

Thus, the primary question raised before this Court is the one which was not raised in the complaint filed with the Commission.

STATEMENT OF THE CASE

I

The Proceedings Before The Commission

In I. C. C. Docket No. 30761, *American Barge Line Company, et al.* v. *Chicago and Eastern Illinois Railroad Company, et al.*, 291 I. C. C. 422, the appellants, common carriers by water on the Mississippi River and the Gulf Intracoastal Canal, filed a formal complaint against the intervening appellees, four railroad companies operating between East St. Louis and Danville, Illinois.

The complaint alleged: (1) that the railroad appellees maintain joint rates over through all-rail routes from Galveston, Texas, to Danville, Illinois, while refusing to join bargeline appellants in *joint differential rates* over through barge-and-rail routes; (2) that as a result the existing rates and charges over barge-and-rail routes from Galveston to Danville are *excessive and unreasonable;* (3) that it is *necessary or desirable in the public interest* to establish such through barge-rail routes and joint rates *with reasonable differentials* under the all-rail rates; and (4) that said refusal of the railroads is in violation of sections 1 and 307(d) of the Interstate Commerce Act, and that defendants are maintaining rates and charges which are discriminatory against complainants as connecting carriers in violation of section 3(4) of the Act (R. 63, 64).

The complaint also alleged (Paragraph IV) that the railroads had subsequently published a reduction in the all-rail rate "which augments and aggravates" the discrimination against the barge lines (R. 63). That reduction, however, was suspended by the Commission and subsequently withdrawn (R. 94). It plays no further part in this proceeding.

At the conclusion of their complaint the appellants prayed that the railroads be required (1) to cease and desist from the aforesaid violations of the Act, and (2) to establish such through routes and joint rates as the Commission *may deem reasonable and just* and otherwise lawful (R. 64).

The Galveston Chamber of Commerce intervened, but submitted no evidence. The American Waterways Operators, Inc., also intervened, but did not appear at the hearing and submitted no evidence. Neither Dixie Carriers nor Coyle Lines submitted evidence.

The appellants' testimony was substantially as follows:

Barge-rail rates are published from Port Sulphur, Louisiana, to Joliet and Danville, Illinois. The joint barge-rail rate at present is $6.66 per gross ton. No joint barge-rail rates have ever been published on sulphur from Galveston, Texas, to any point.

Federal maintains joint all-water rates with Dixie and Coyle from Galveston to Upper River Ports, such as East St. Louis. The rates are generally $1.01 per gross ton over Federal's local rates from Port Sulphur.

At the request of a shipper (the purest of hearsay!) Federal filed a proposal for a joint barge-rail rate from Galveston to Danville of $7.67 per gross ton with the Illinois Freight Assn. on December 27, 1949. The proposal was not recommended (R. 77-79).

The price of sulphur loaded in barges at Galveston, Texas, is $1.50 per gross ton higher than on sulphur loaded into rail cars at Texas mines. Adding the $1.50 price differential would make the charges via the proposed barge-rail route from Galveston to Danville $9.17 per gross ton, as compared with the all-rail rate of $9.184 from Texas mines to Danville. The barge lines were told they would be able to get the traffic with a difference of 1.4¢ per ton because of *some absorption made in the transportation charge from Galveston to New Orleans* (R. 80-82).

The barge lines propose to retain $5.41 out of the proposed rate of $7.67, leaving $2.26 for the rail carriers. The present water rate from Galveston to East St. Louis is $5.32 per gross ton (R. 83).

There has been a barge-rail movement of sulphur from Galveston to Danville, but not by Federal Barge Line. The water leg of the haul was performed by a contract carrier, Commercial Petroleum Transport (R. 87-88). The tonnage approximates 20,000 tons per year and has moved for the past two or three months via all-rail (R. 93).

The appellees' testimony was substantially as follows:

The present rail rates from Galveston to Danville are depressed rates established to meet barge competition, and are thus substantially below the normal basis (R. 95, 96, 116). The preponderance of the traffic during the last six months of 1950 moved via barge-rail (R. 101).

The barge-rail charges from Galveston to Danville via contract carrier aggregate $8.00 per gross ton. The contract carrier barge charge is $4.65 per gross ton as contrasted with Federal's local rate of $5.32. The aggregate barge-rail charge via Federal is $8.71 per gross ton, which includes handling charges of 44¢ (R. 101, 102, 117).

The railroads are not amenable to joining in through single-factor rates from Galveston to Danville. In the

first place, it would reduce railroad earnings beyond East St. Louis (R. 104, 105). The Wabash is participating at present in a barge-rail movement (R. 112).

On December 22, 1952, the Commission, Division 3, dismissed the complaint. The Division found (287 I. C. C. 403) that while there had been no movement on the assailed barge-rail combination rate, the preponderance of the sulphur traffic from Galveston to Danville during the last six months of 1950 had moved by contract carrier barge to East St. Louis and rail beyond. It was further found that the rail rates from Galveston to Danville and from East St. Louis to Danville were on a depressed basis. The barge lines demand $5.41 as a division of their proposed rate of $7.67, as contrasted with their present local rate from Galveston to East St. Louis of $5.32 per gross ton.

No shippers appeared in support of the proposed rate at the hearing.

There is no evidence of record to warrant a finding that the present barge-rail combination rate is unreasonable. There is no showing that the proposed joint through one-factor rate is necessary or desirable in the public interest under Section 307(d) of the Act. The National Transportation Policy does not require the Commission, in the fair and impartial regulation of all modes of transportation, to force rail carriers, whose rates are already depressed to meet barge competition, to further depress their earnings to favor that competition. If the barge lines desire to participate in the transportation, they may do so by reducing their own rate from Galveston to East St. Louis. It was further found that the evidence would not sustain the barge lines' allegation under Section 3(4) of the Act (R. 22-28).

Following the decision of Division 3, the appellants filed their Petition for Reconsideration. This petition

and the oral argument that followed were confined to the issue which arises under paragraph 4 of Section 3 of the Act as applied to the question of joint through one-factor rates. The appellants' present argument under Section 3(4) on the question of divisions versus local rates was not one of the issues raised in their complaint and was specifically disclaimed on oral argument, as follows:

> Commr. Alldredge: Are you asking for establishment of joint through rates or simply the removal of discrimination, either that way, or through the establishment of proportional rail rates?
>
> Mr. Belnap: No, we are asking for joint through rates and urge you that this is the necessary step to remove the discrimination demonstrated.
>
> Commr. Alldredge: If the Commission required the railroads to establish beyond East St. Louis a proportional rate—
>
> Mr. Belnap: Equivalent to their division, that would be one method of curing the thing about which we complain, but *that isn't the relief we have asked. I don't believe that is really one of the issues of our complaint* because our complaint asks for through, joint through rates to cure the discrimination (R. 147-148).

On January 19, 1954, the full Commission issued its Report and Order On Reconsideration, dismissing the complaint. The pertinent parts of that decision follow:

> "the record affords no support for a finding that the present combination barge-rail rate 91.4 cents (per gross ton) lower than the present all-rail rate, is unreasonable for the through service offered thereunder. There is also no evidence affording a basis for a conclusion that the proposed difference of $1.514 between the present all-rail rate . . . and the suggested barge-rail rate from Galveston, or any par-

ticular differential, is required to remove the alleged discrimination against barge lines and to result in rates that would be consistent with the national transportation policy to preserve the inherent advantages of all modes of transportation. The complainants cited decisions in which such rate differences were prescribed, *but the prescriptions were based upon a presentation of adequate evidence, which was not the case here.*" (R. 30)

"Here, no shipper has evidenced an interest in the rate sought, and the rate over the all-rail route which it is intended to meet is on a depressed basis. In these circumstances, we cannot find that the public interest requires the establishment of the joint barge-rail rate sought." (R. 31)

(None of the findings thus far quoted were challenged before the lower court.)

"At the oral argument counsel for complainants agreed that one way the alleged discrimination could be removed would be by the use of $2.26 as a proportional rate for the services of the defendants operating from East St. Louis to Danville . . . He stated, however, that he did not believe that that was one of the issues of their complaint. This belief appears to be correct" (R. 31)

(Appellants now seek a reversal of the Commission's entire decision on a point not raised in their complaint. See Appellants' Question No. 1.)

"The comparison is between a rate or charge paid by a shipper and a division of a joint rate received by rail carriers and is of unlike things. Basically, divisions of joint rates are the result of contractual arrangements between carriers; they are not rates or charges as those terms are used in Section 3(4) of the Act." (R. 32)

"The rail rate of $2.95 from East St. Louis to Danville, used as a component of the through combination barge-rail rate on complainants' traffic . . . is also used for similar application on sulphur carried from Galveston to East St. Louis by contract carriers by barge. It will also apply on sulphur moved to East St. Louis by rail carriers not parties to joint rates. The depressed character of this rate (is) . . . shown by its comparison with noncompetitive rail rates . . . in the same general area. A proposal of defendants to further reduce the application of the same rate . . . was suspended *upon protest of the barge lines* . . . Had that rate been permitted to become effective the rate from East St. Louis to Danville would now be approximately the same as the rail division . . . but such a rate would then have been available to the traffic of all carriers not parties to joint rates . . . including traffic moved into East St. Louis by contract carriers by barge." (R. 32)

The Commission found that the total cost of the barge transportation was $4.32 per gross ton as contrasted with the local rate of $5.32 per gross ton and the suggested component of $5.41 on the proposed joint rate. The Commission then observed "that if any reduction in the barge-rail charge from Galveston to Danville is needed, it ought to come out of the barge factor and not out of the depressed rail factor" (R. 32-33).

II

The Proceedings Before The Lower Court

On May 24, 1955, the appellants filed their complaint in the District Court, seeking reversal of the Commission's decision. The court complaint recounted the pro-

ceedings before the Commission as follows: "In said complaint (before the Commission) plaintiffs alleged in substance that the said defendants discriminated against them . . . by reason of the failure and refusal of said defendants to join with plaintiffs in a joint through barge-rail rate . . ." (R. 5, 6)

(It will be noted that appellant's description of their own complaint before the Commission does not mention the issue now sought to be raised before this Court by Appellant's Question No. 1.)

The lower court summarized appellants' position as follows:

> "Plaintiffs claimed before the Commission and claim here that under such Act the combination rates and charges on sulphur over barge-rail routes from Galveston . . . to Danville, Illinois, were unreasonable, that they discriminated against Plaintiffs, and that the public interest required that a through barge-rail route and joint through barge-rail rates be established with reasonable differentials, etc." (R. 49)

The Court found that the findings and conclusions of the Commission were adequate, fully supported by the evidence and in full accord with the Act (R. 50). The Court further stated:

> "the Commission in determining the questions was required and we are required to consider not only Plaintiffs desire for and interest in a through . . . route and through joint rate, but the effect thereof if established upon all others concerned," citing *Ayrshire Corporation* v. *United States*, 335 U. S. 573. (R. 50)
>
> "No shipper nor consumer of sulphur nor other person is making common cause with Plaintiffs." (R. 51)

> "When the whole record is considered in the light of all the provisions of the Act . . ., we think Plaintiffs have not shown their claim of discrimination to be meritorious." (R. 52)

Subsequently, appellants filed a Motion for New Trial. The motion states in part:

> "Plaintiffs sought review of the Commission's decision *only* because it held as a matter of law that divisions of through rates are not charges within the meaning of the section cited [3(4)]." (R. 57)
>
> "Plaintiffs further suggest that there be eliminated from the findings all references to the $1.50 per gross ton difference in selling price of sulphur . .. . as being not pertinent to the issues of this case." (R. 59)

The motion for new trial was denied by order of the court, March 28, 1955. This appeal followed.

III

The Proceedings Before The Supreme Court

In their Statement As To Jurisdiction, appellants are quoted as follows at page 3:

> "The matter complained of is the charging by said railroads of their . . . local rail rate on ex-barge sulphur originating at Galveston . . . while contemporaneously joining with connecting railroads . . . in a joint through rate . . . out of which said railroads accept a secret contractual division less than said local rate."

Again, the primary matter on appeal bears no resemblance to the original complaint before the Commission.

While they "complain" solely on the issue above, appellants nevertheless present four specific questions:

> (1) Whether a division is a "rate" or "charge" within the meaning of Section 3(4);
>
> (2) Whether the action of a railroad in participating with one connecting carrier in through routes and joint rates, while refusing so to participate with another carrier is, in itself, unlawful under Section 3(4); (Three observations are in order here: (1) The question improperly assumes that the rail carrier performs the same service in each instance; (2) The appellants avoid the question of public interest under Section 15(3); (3) The question of evidence to support a finding of necessity for joint differential barge rates under Section 15(3) and 307(d) is brushed aside.)
>
> (3) Whether the circumstances relied upon by the Commission are sufficient to warrant the difference in treatment; and
>
> (4) Whether the conclusion of the Commission is supported by adequate findings and substantial evidence.

The United States remained silent in the lower court and did not take any affirmative steps in the appeal to the Supreme Court. Its first appearance came in opposition to the Motion to Affirm. It now files a brief presenting two questions, the first of which is:

> (1) Whether the National Transportation Policy requires the Commission in every instance to establish, under Section 307(d) of the Act, joint barge-rail rates differentially related to the all-rail basis.

The Government's second question is substantially the same as appellants' second, except that the government's question contains no reference to through routes.

Summary of the Argument

Appellants allege that this appeal is based solely upon an error of law by the Commission. The law to be applied, however, and the manner of its application, depend upon the facts of record. Accordingly, we shall treat first with the facts and then with the law.

The appellants' final question inquires whether the Commission's conclusion is supported by adequate findings and substantial evidence. Appellants' brief displays no real interest in that question. These appellees believe, however, that a full understanding of the problem requires at least a brief resume of *all* of the allegations made by appellants, and the evidence, or lack of same, adduced in support thereof.

Under Points I and II, appellees will discuss the issues of reasonableness of the present rates and the necessity or desirability in the public interest of establishing through routes or joint rates.

The appellants did not question these findings in the lower court nor do they challenge them here. Before the Commission, the appellants sought a differential joint rail-barge rate. Their question here is addressed only to a simple joint rate.

The United States contends that a joint barge-rail rate with reasonable differentials is required under the National Transportation Policy. Appellees will demonstrate, however, under Point III that the policy enunciated provides for the welfare of all carriers, does not require special or favored treatment for water carriers under any circumstances, and *cannot be substituted for probative evidence.* Appellants further contend that, as a matter of law, a carrier cannot join with one connecting line in a through route or joint rate and refuse to so join with another. Appellants rely solely on Section 3(4), whereas

the question inevitably involves Section 15(3). Appellees will demonstrate under Point IV that Section 3(4) does not treat of routes and was clearly not intended to deprive the carriers of all discretion in entering into voluntary contractual arrangements, nor was it intended to divest the Commission of its statutory discretion under Section 15(3).

Under Points V, VI, and VII, appellees will refute appellants' contentions: (1) that a division is a rate, fare or charge under Section 3(4) of the Act, and (2) that the acceptance of a division of an all-rail joint rate, which is lower than a local rate assessed on other traffic, constitutes discrimination under Section 3(4). The appellants did not raise this issue in their complaint to the Commission, nor did they seek leave to amend their complaint as permitted by the Commission's Rules of Practice. Moreover, they specifically waived the issue in oral argument before the Commission.

Whether a "division" is a "rate" or "charge" under Section 3(4) is primarily a question of law, but whether a difference in a division vs. a rate or charge constitutes discrimination is a mixed question of law and fact, which, in any event, would require a showing that the circumstances and the law under which each is established are the same.

While raising a number of issues and a variety of questions, counsel for the appellants made it exceedingly clear that they desire one and only one order—the establishment of through routes and joint rates. An order under Section 3(4), however, is an alternate order; it directs a party to remove the discrimination, it does not prescribe how it shall be done. A prescription of through routes and joint rates, can emanate only under Sections 15(3) or 307(d) which require a showing that the proposal is necessary or desirable in the public interest. In the final

analysis then, the reversal sought before this Court under Section 3(4) would neither solve the appellants' alleged difficulties nor be responsive to the primary relief sought by the complainant. The primary relief sought, through routes and joint rates, lies with the Commission, not with this Court.

ARGUMENT

I

The evidence establishes and the Commission found that the local rate from East St. Louis to Danville was depressed below the normal level, and thus was neither excessive nor unreasonable.

The appellants introduced no evidence in support of this issue. The railroads, however, showed that other rates on sulphur emanating from East St. Louis and Joliet were higher by several dollars per ton for comparable distances (Ex. 4, R. 116). The local rail rate of $2.95 per gross ton is only 9.2 percent of first class as compared with the general basis for rail rates on sulphur in eastern territory of 23.5 percent of first class (R. 95, 96). The Commission, Division 3, correctly concluded that the rail rates were on a depressed basis (R. 24), and *the appellants have not appealed that finding.*

Of course, the appellants originally contended that the present barge-rail *combination* was excessive and unreasonable. Since the rail rate of $2.95 is on a depressed basis, it is self-evident that an unreasonable combination could only stem from an excessive barge factor, *i. e.*, the local barge rate of $5.32 per gross ton from Galveston to East St. Louis. While the Commission held that the record would not support a finding that the combination was unreasonable (R. 30), it concluded with the observation

"that if any reduction in the barge-rail charge . . . is needed it ought to come out of the barge factor and not out of the depressed rail factor" (R. 33).

This is a particularly pertinent observation since, as appellees will hereinafter demonstrate under Point VII, the appellants' competitive difficulties arise from their own inflated local factor rather than from any action or inaction on the part of the railroads.

II

The evidence fails to establish that through routes and joint rates are necessary or desirable in the public interest.

As complainants before the Commission, the appellants were required to bear the burden of proof. *Swift & Company* v. *United States*, 343 U. S. 373.

Section 15(3) of the Act provides in part as follows:

> "The Commission *may*, and it *shall* whenever deemed by it to be *necessary or desirable in the public interest* . . . establish through routes, joint classifications, joint rates, fares, or charges . . ."

The same language is expressed in Section 307(d) of the Act. These are the only sections of the Act in which these provisions are found, and it necessarily follows that the appellants must provide, by probative evidence, a basis which will enable or permit the Commission to act thereunder. The thought has been succinctly expressed by this Court in previous proceedings. Thus, in *Virginian Railway Company* v. *United States*, 272 U. S. 58, the Court stated at page 666:

> "The Virginian contends that the order is void because the Commission directed the establishment of through routes and joint rates without finding that

> they are necessary in the public interest. Such a finding is *essential* to the validity of an order under Section 15(3)."

The "public interest" has been defined by this Court as "not a mere general reference to public welfare, but . . . has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities." *Texas* v. *United States*, 292 U. S. 522, at page 531.

The appellants introduced no evidence of proposed economies or efficiencies, they did not challenge the adequacy of the transportation services available, nor did they contend that their proposal entails the best use of transportation facilities.

Appellants' testimony dealt with the service offered by the barge lines, the rail and barge rates (Exhibit 1), the distances involved, (Exhibit 2) and the composition of the joint barge-rail rate sought. No shippers, consignees, or other parties supported appellants' proposal.

The evidence indicated, moreover, that sulphur was moving freely via barge-rail under a contract carrier rate of $4.65 per gross ton as compared with appellants' inflated local rate of $5.32 per gross ton. Under these circumstances, the Commission concluded that the appellants' proposal was not required in the public interest (R. 31).

Appellants do not appeal this finding.

III

Neither Section 307(d) of the Act nor the National Transportation Policy requires the Commission to establish through routes or joint rates without probative evidence in support thereof.

While the appellants originally contended that the railroads' refusal to join in a through route and joint rate was in violation of Sections 1 and 307(d) of the Act, they have, to all intents and purposes, abandoned this question. Section 307(d) requires the same showing of public interest found in Section 15(3), and their utter failure to make such a showing precluded any favorable possibilities on appeal. Appellants' appeal, therefore, is restricted to Section 3(4).

The United States, however, contends that the National Transportation Policy requires the Commission to establish through routes and joint rates with reasonable differentials under Section 307(d) of the Act.

Section 307(d), insofar as pertinent here, provides as follows:

> "In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water."

We have already discussed appellants' failure to show the necessity or desirability in the public interest of a through route and joint rate. The Commission, moreover, found that there was:

> "no evidence affording a basis for a conclusion that the proposed difference of $1.514 between the present all-rail rate from Galveston and the suggested barge-rail rate from Galveston, or any particular differen-

tial, is required to remove the alleged discrimination against barge lines and to result in rates that would be consistent with the national transportation policy to preserve the inherent advantages of all modes of transportation" (R. 30).

The statute, of course, expressly provides that the Commission may prescribe reasonable differentials in rail-barge joint rates only "in the case of a through route." No through routes exist via appellants and railroad appellees from Galveston to Danville, *Thompson* v. *United States,* 343 U. S. 549, and a through route is a necessary prerequisite to the establishment of a joint rate, *Western Pacific R. Co.* v. *Northwestern Pac. R. Co.,* 191 I. C. C. 127, 131; *Georgia & F. R.* v. *Atlantic Coast Line R. Co.* 191 I. C. C. 489, 499.

The statute, moreover, requires the Commission to prescribe "such *reasonable* differentials as it *may find to be justified.*" Manifestly, the Commission is required to make a finding of what is or is not a reasonable differential, and, like any other affirmative finding by the Commission, it must be supported by substantial evidence. *U. S. ex rel., Chapman* v. *Federal Power Commission,* 191 F. 2d 796, affirmed 73 S. Ct. 609.

What evidence has been adduced to support the prescription of a "reasonable" differential? The present barge-rail combination enjoys an existing differential of 91.4¢ per gross ton (R. 30), thus:

All-rail—Galveston to Danville	$9.184
Combination barge-rail (5.32 + 2.95)	8.27
Differential	$ .914

While the appellants did not participate in the traffic, at least previous to the hearing, it was not shown that their

failure to do so resulted from a difference in rail rates. It most certainly did not result from the application of the local rail rate of $2.95 per gross ton since the record shows that in the period covered by a movement study, the preponderance of the traffic was moving via *barge-rail.* It moved by a contract carrier barge, however, under a rate of $4.65 per gross ton, substantially less than either appellants' local rate of $5.32 or their suggested division of $5.41.

While some of the traffic moves all-rail, the Commission was simply left to speculate on the reasons why the traffic should move via one mode or the other. It may well be, in the case of the rail shipments, that the consignee desired smaller lots in regular service, or that he was faced with an emergency which demanded an immediate increase in supply. These and many other factors must be taken into consideration by the Commission in prescribing differentials between rail and water service. The appellants, however, supplied none of these details in support of their complaint.

No shipper or consignee appeared. The appellants' witness simply stated that he was "told" that appellants would "probably be able to get some sulphur from Galveston on that rate ($7.67) because of *some absorption* made of the * * * transportation charge, from Galveston to New Orleans" (R. 82). This is hearsay in its purest form and entitled to no weight whatsoever. Moreover, the simple statement could not possibly serve as the basis for a reasoned, well-informed finding.

What is or is not absorbed by the shipper at Galveston is not of record. It is only another and highly important factor upon which the Commission could only speculate. It is important, however, because to whatever extent the shipper absorbs a part of the barge transportation costs, the cost of such carriage to the consignee is reduced, and it is

the consignee who controls the routing of the traffic. Since the shipper does absorb *some* of the transportation, it is obvious that the apparent differential between all-rail and barge-rail of 91.4¢ per gross ton is, in fact, much greater.

Notwithstanding the complete absence of evidence required by the Act, the United States contends that the Commission is required to grant the relief sought by the appellants "in order to effectuate the National Transportation Policy" and preserve the "inherent advantages" of each form of transportation. In effect, the United States alleges that the National Transportation Policy, in and of itself, sweeps aside all other requirements of the Act and becomes the evidence of record. This is an untenable conclusion.

It is well established by decisions of this Court that orders of the Commission must be based upon the substantive transportation standards of the Interstate Commerce Act rather than upon mere general expressions of congressional policy. *Ann Arbor R. Co.* v. *United States,* 281 U. S. 658; *United States* v. *New York Central R. R.,* 263 U. S. 603. The policy itself is simply a guide for the Commission in the administration of the Act. *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 82.

The contention of the United States is based solely on the decision of this Court in *Interstate Commerce Commission* v. *Mechling,* 330 U. S. 567. As determined by the lower Court, however, "the facts there differ greatly from the facts here."

The *Mechling* case did not involve the establishment or refusal to establish through routes and joint rates. It dealt only with separately established proportional rates over which traffic was moving. These were components of existing through routes on which through combination rates applied. 330 U. S. 567, p. 570. Neither Section 15(3) nor 307(d) were involved. Section 307(d) was included

only in the discussion of the Congressional policy as construed by the Court (p. 574), concluding with the observation at page 577 that while the Commission is "authorized" to fix reasonable differentials, it is not authorized to neutralize the effective prohibitions of other provisions which are expressly designed to prohibit discrimination against water carriers.

This is a far cry from *requiring* the Commission to establish through routes and joint rates with reasonble differentials without the substantial evidence required by the Interstate Commerce Act and the Administrative Procedure Act. If the Commission's order cannot be supported under the substantive provisions of the Interstate Commerce Act, clearly then, it could not be required as a matter of law by a general expression of congressional policy. *Ann Arbor R. Co.* v. *United States, supra; United States* v. *New York Central R. R. Co., supra.*

The National Transportation Policy provides "for fair and impartial regulation of all modes of transportation * * * so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical and efficient service." It does not command the Commission to favor the water carriers at the expense of other modes of transportation. Yet, that is precisely what appellants are contending here. A simple review of the record results in three obvious conclusions:

(1) At the time the appellants first commenced negotiations with the railroads, the preponderance of the traffic was moving via barge-rail. Thus it was not the all-rail rate with which appellants were beset. It was the competition from contract water carriers moving sulphur at $4.65 per gross ton over the barge-leg of the haul. This same situation has arisen in other proceedings before the Commission. (See *Crude Sulphur From Ohio To Ohio Points And Erie, Pa.* 293 I. C. C. 655, at p. 658). The appellants

do not choose to reduce their local rate to meet this competition, but seek instead a reduction in the railroad revenues through a joint rate out of which the railroads are to accept a division, less in amount than they received on the ex-barge sulphur then moving.

(2) The bargelines' usual "inherent advantage" is absent here. This traffic does not originate on the water. It requires a previous rail haul, transfer of lading from cars to storage bins, reloading from bins to barges, and from barges back into cars. Obviously, this is not the economical service and does not provide for the most efficient use of transportation equipment. The appellants here seek to attract inland traffic to unnatural and circuitous transportation by water. Manifestly, this was not intended by the Act, nor is the Commission required by the National Transportation Policy to encourage such service. Appellants are not entitled to preferred treatment and, under such circumstances, their proposal must stand on its own merits. If, indeed, the appellants desire to attract inland traffic, it should be done by adjusting their own rates, as the contract carrier obviously did, instead of seeking relief from the Commission in a reduction of rail revenues under the guise of public interest.

(3) The contention of the United States that the Commission cannot maintain barge rates at an arbitrarily high level and thus deny shippers the inherent advantage thereof, while true, has no application here. The appellants, not the Commission, are maintaining inflated rates on barge traffic and propose a further increase in barge revenue from $5.32 to $5.41 per ton. By their insistence upon maintaining the present level of barge revenues, appellants, and not the Commission, deny shippers the benefit of an unproven and extremely dubious "inherent advantage".

The appellants also contend that the Commission refused to order joint rail-barge rates solely because of the de-

pressed character of the local rail rate. Appellants thereby misstate the point. The Commission, recognizing that appellants' failure to participate in the traffic was due to the inflated barge factor rather than the depressed rail factor, concluded that the National Transportation Policy, in the fair and impartial regulation of all modes of transportation, did not, under these circumstances, require a further reduction in the depressed rail factor simply to permit appellants' participation in the traffic at increased revenues.

In *Alabama Great Southern Railroad Co.* v. *United States,* 340 U. S. 216, the Court considered an order of the Commission requiring rail carriers and barge lines to establish certain joint through routes and joint rates on prescribed differentials from higher all-rail rates. (*Rail and Barge Joint Rates,*[1] 270 I. C. C. 591).

The Court, in discussing the Commission's decision, noted that the barge lines, "in order to protect the sole advantage of their service to the public, are willing to accept less for their inferior service." 340 U. S. 216, at page 225. In the instant proceeding, however, the appellants actually seek an increase in the barge factor. The consignee presently has available a barge rate of $4.65 per gross ton. The appellants thus offer no additional benefits except increased revenues for themselves at the expense of the railroads.

This fact makes it extremely doubtful, to say the least, whether the inflated local barge rate reflects "adequate and efficient water transportation service at the lowest cost consistent with the furnishing of such service." In any event the appellants' attempt to increase their revenues at the expense of already depressed rail earnings is not in harmony with the Congressional directive "to provide

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[1] The order was based on a finding that such routes and rates were necessary and desirable in the public interest under Section 307(d), 270 I. C. C. 591, 616.

for fair and impartial regulation of all modes of transportation" and "to foster sound economic conditions in transportation".

IV

A carrier, having entered into one joint rate, is not, as a matter of law, required to so join with all other carriers in similar arrangements, and its refusal to do so is not unlawful under Section 3(4).

Section 3(4) of the Act simply prohibits discrimination in rates, fares and charges between connecting lines. Whether or not discrimination exists in any given case is for the Commission to decide under all the pertinent facts. *United States* v. *Louisville & N. R. Co.*, 235 U. S. 314. Discrimination exists, in any event, only where the circumstances of the case are shown to be similar in all material respects, for otherwise, no valid comparison exists.

Appellants and the United States cite a number of cases in which the Commission has ruled that discrimination exists, but these cases do not support the proposition contended for here as a matter of law. Each proceeding must be judged by the Commission on its own merits. In all of the Commission decisions cited, for example, through routes were there in existence, which is not the case here.

While the question proposed by the United States is restricted to joint rates, the appellants charge discrimination in entering into through routes. This merely serves to emphasize the distinction which must be made. Section 3(4), insofar as pertinent, deals solely with "rates, fares and charges". It contains no reference to through routes or the absence thereof. As the appellees have previously pointed out, the existence or non-existence of a through route does not depend on the rates or charges applicable thereto, *Thompson* v. *United States, supra,* and the establishment of joint rates is an act entirely separate

and distinct from the establishment of through routes. *United States* v. *Great Northern Railway Co.*, 343 U. S. 562, 573.

Neither the Court nor the Commission is empowered to prescribe or enforce the establishment of joint rates under Section 3(4) since, as appellees have previously pointed out, a through route is a necessary prerequisite to the establishment of a joint rate. *Western Pacific R. Co.* v. *Northwestern Pac. R. R. Co., supra.*

Since the Act does not comprehend the establishment of joint rates in the absence of through routes (See Section 307(d), for example), it necessarily follows that the existence of joint rates over through routes as against the absence of joint rates where no through routes exist does not constitute discrimination prohibited by Section 3(4). *Western Pacific R. Co.* v. *Northwestern Pac. R. Co., supra.* The appellants, in effect, contend that when a railroad enters into one arrangement voluntarily in the exercise of its discretion, it thereafter has no discretion and must, under all circumstances, make the same arrangements with all other carriers. In the *Western Pacific* case, *supra,* the Commission dealt with a similar contention thus:

> "Therefore (under the facts) the refusal of the Northwestern Pacific to participate with the Western Pacific in joint rates to the extent it participates in joint rates with the Southern Pacific cannot be said to be in violation of Section 3(3) [now 3(4)]. A carrier may voluntarily enter into an arrangement where it is short-hauled, but we are without power to require it to do so." Page 135.

It necessarily follows that while carriers may enter into voluntary arrangements which might or might not be required by the Commission, they are not, as a matter of law, thereafter required to make similar arrangements with all other carriers.

The requirement of an existing through route is aptly demonstrated in the *Ogden Gateway* case, now before this Court on separate appeals in Nos. 117, 118, 119. While it would be inappropriate to comment on the merits of these cases, it is clear from the Commission's decision, *Denver & R. G. W. R. Co.* v. *Union Pacific R. Co.*, 287 I. C. C. 611, that it considered through routes of primary importance, thus at p. 615:

> "The first question for our determination therefore, is whether or not the present routes by way of the Ogden Gateway constitute 'through routes' ".

It will be noted that in the cases cited by appellants, the findings under Section 3(4) refer solely to rate, not *routes*.

Appellants thus attempt to bypass the restriction of "public interest" placed on the Commission itself by Section 15(3) in directing the establishment of through routes and joint rates. Discrimination, moreover, implies a comparison of like with like, and for another carrier to establish discrimination in the existence or non-existence of joint rates, it would be incumbent upon the proponent to establish that the joint rates it desires are *also* "necessary or desirable in the public interest", for otherwise there is no similarity of conditions for comparison.

The through routes and joint rates sought herein by appellants, of course, do not provide for the entire movement, as do the all-rail routes and rates. The latter embrace the entire movement from the Texas mine to the consignee, whereas the appellants seek routes and rates which apply only after a previous rail haul and transfer of lading at Galveston.

It should be recognized that the appellants were seeking through routes and joint differential rates before the Commission, whereas before this Court they base their question on simple "joint rates". There is a substantial dif-

ference between the two. Appellants ought not be allowed to present one question to the Commission and subsequently urge a different question in this Court as reversible error.

V

The question whether discrimination is created by the application of a division as opposed to a higher local rate was not raised before the Commission and cannot be urged as reversible error on appeal.

Whether the "division" of a joint rate is a "rate, fare, or charge" under Section 3(4) of the Act is a simple question of law, and this query clearly must be answered in the negative.

Appellants' argument assumes, contrary to fact, that a division and a local rate represent compensation to the railroad *for the same service*. With this assumption the question becomes an issue of *law and fact* which must first be presented for the *expertise* of the Commission. There was no evidence, pro or con, on that issue, and correctly so, since none was called for by the issues raised in the complaint.

Appellants contend that the issue was covered in their complaint before the Commission by the allegation that "defendants are maintaining rates and charges which are discriminatory against complainants." The Commission's Rules of Practice make this contention untenable.

Rule 28 of the Rules of Practice states, in part, that:

> "A formal complaint must be so drawn as *fully and completely* to advise the parties defendant and the Commission in what respects the provisions of the act have been and are being violated, and should set forth briefly and in plain language *the facts claimed to constitute such violation.*"

Rule 30(a) additionally provides:

> "A complaint that alleges the act is violated because of an * * * unjust discrimination should specify clearly *the particular elements stated in the act as constituting such violation* and the *facts which complainant relies upon to establish it.*"

The *facts* relied upon by appellants in their complaint are set out in Paragraph III thereof. The only discriminatory treatment there alleged is the matter of through routes and joint differential rates. There is no mention of divisions. The appellants' witnesses did not testify upon the subject of divisions versus local rates. The fact that the division was lower (which is usually the case) did not appear until later.

Realizing, after the decision of Division 3, that their evidence was woefully inadequate to justify the relief sought, appellants confined their Petition for Reconsideration to the single point of divisions versus local rates. On oral argument, however, they returned to their original contentions, admitting that they had not originally raised the "division" issue, thus (R. 147-148):

> "I don't believe that is really one of the issues of our complaint."

Of course, after the hearing, if they then intended to seriously urge the question before the Commission, they could have sought leave to amend their complaint under Rule 20 of the Rules of Practice or petitioned the Commission for further hearing. Appellants made no attempt to avail themselves of these further administrative remedies.

The authorities are unanimous in that a question either waived or not raised before an administrative body cannot and will not be considered on judicial review of the

agency's action. *United States* v. *Baltimore and Ohio R. R. Co.*, 231 U. S. 274; *United States ex rel. Coltman* v. *Bullock*, 110 F. Supp. 126.

VI

The "division" which a carrier receives out of a joint rate is not a "rate, fare, or charge" under Section 3(4) of the Act.

It is an elementary principle of statutory construction that technical terms when used in a statute are presumed to have been used with their technical meaning. *Hawley* v. *Diller*, 178 U. S. 476. "Division" as used in the Interstate Commerce Act is a technical term, denoting the share which a carrier receives as its *portion* of a joint rate. *St. Louis S. W. Ry Co.* v. *United States*, 245 U. S. 136.

"Rates, fares, or charges" have also been recognized by this Court as technical terms in the Interstate Commerce Act, *Detroit, G. H. & M. Ry. Co.* v. *Interstate Commerce Commission*, 74 F. 803, aff. *Interstate Commerce Commission* v. *Detroit, G. H. & M. Ry. Co.*, 167 U. S. 633. The Court of Appeals therein found, contrary to appellants' contention, that "charges" as used in the Act denotes "segregated items of expense or dues which are to be demanded by the carrier for any service in connection with the transportation, or with the receiving, delivering, storage, or handling of goods."

The very language of the Act requires the appellants' question to be answered in the negative. Divisions are, when referred to, specifically designated. Many sections of the Act refer to rates, fares, and charges. Comparatively few deal with divisions. It will be noted, for example, that Section 6(1) of the Act [63 Stat. 486, 49 U. S. C. 6] requires the publication of schedules showing all "rates, fares, and charges." There is no similar requirement for divisions. *Chase & Co.* v. *N. Y. C. R. R.*, 161

I. C. C. 614. While Section 1(4) of the Act requires "just and reasonable rates", it requires the establishment of "just, reasonable and *equitable* divisions of joint rates." This distinction carries on throughout the Act. Thus, while Section 3(4) deals with discrimination in rates, fares, or charges, Section 15(6) provides that the Commission may prescribe *divisions* of joint rates, fares and charges when it "is of the opinion that the divisions of joint rates, fares, or charges * * * are or will be unjust, unreasonable, inequitable, etc." This section also sets out certain standards which must be followed in prescribing divisions, failure to observe which invalidates the Commission's order. *Brimstone Railroad and Canal Company* v. *United States, et al.*, 276 U. S. 104. Substantially the same language is contained in Section 307(e) of the Act.

The only case cited in support of appellant on this point is the Commission's decision in *Western Pacific Co.* v. *Southern Pacific Co.*, 55 I. C. C. 71, 81. Two brief observations disqualify this case as a substantial precedent:

(1) Through routes and joint rates were then in existence. The dispute arose because of alleged discrimination between divisions, not between divisions and rates;

(2) The decision was issued in 1919, whereas Section 15(6), setting out the Congressional directives on the subject was enacted in 1920. This was a substantial change in the law. Prior thereto, there was considerable doubt as to the extent of the Commission's authority over divisions, "and the Transportation Act, 1920, undertook by Section 15(6) to remove doubts which had arisen". *New England Divisions Case*, 261 U. S. 184, 194.

With the Transportation Act of 1920, the Congress authorized the Commission to deal with divisions in one

and only one way. A legislative affirmative description of powers conferred implies denial of nondescribed. *Continental Casualty Company* v. *U. S.*, 314 U. S. 527.

VII

The inherent differences between divisions and local rates preclude a finding of unlawful discrimination by a simple comparison of the two.

In its earliest decisions, the Commission has held that divisions are unlike and not comparable to rates, fares and charges. *Board of Trade of Troy, Ala.* v. *A. M. Ry.*, 6 I. C. C. 1, 23. As a rule the division of a carrier on through business is less than its local rate between the same two points, *Gump* v. *B. & O. R. R.*, 14 I. C. C. 98, 105, and a division of a joint rate which the carrier accepts as its proportion is not a test of the lawfulness of its separately established rates. *Bituminous Coal to Youngstown*, 163 I. C. C. 3, 12.

This proposition has been approved by the Court. In *Texas and Pacific Ry.* v. *Interstate Commerce Commission*, 162 U. S. 197, the Court stated at page 239:

> "The mere fact that the disparity between the through and local rates was considerable did not, of itself, warrant the court in finding that such disparity constituted unjust discrimination."

This principle was confirmed in *Parsons* v. *Chicago & Northwestern Ry.*, 167 U. S. 447. To the same effect are *Tozer* v. *United States*, 52 F. 917, and *Chicago & Northwestern Ry. Co.* v. *Osborne*, 52 F. 912, cert. denied, 146 U. S. 354. In the *Tozer* case, the court stated at page 916:

> "Again, at the time of the passage of this act, joint through tariffs were well known, as well as the fact that they were generally less than the sum of the local

> tariffs * * * if Congress had intended to make the local tariff subordinate to or measured by the joint tariff, its language would have been clear and specific."

Again, as stated by the Supreme Court in the *Abilene Divisions Case*, 265 U. S. 274, at page 284:

> "It is settled that in determining what the divisions should be, the Commission may, in the public interest, take into consideration the financial needs of a weaker road; and that it may be given a division larger than justice merely as between the parties would suggest 'in order to maintain it in effective operation as part of an adequate transportation system,' provided the share left to its connections is 'adequate to avoid a confiscatory result.' "

All of the cases cited by appellant in support of its proposition were decided prior to the enactment of Section 15(6).

Appellants admit that a shipper cannot complain of divisions since he is unconcerned about the apportionment of the through rate, but they allege that they are, as a matter of law, entitled to have no greater charge applied to traffic moving beyond their lines than the carrier beyond accepts as a portion of a through rate. In this respect they place great reliance on *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567. In that proceeding, however, there was no question of joint rates or divisions. The traffic there was moving on through rates which were combinations of "distinctly separate" rates. The Court was comparing *separately established and published proportional rates*, which, as we have previously pointed out, are inherently different in nature from divisions.

At pages 14-15 of the *Statement As To Jurisdiction*, appellants themselves recognize that the *Mechling* case does not govern the proceeding here, but allege that the

Commission's decision is contrary to the *spirit* of the Court's decision in that it is based on form rather than on substance. Continuing with this line of reasoning, appellants *recognize and admit* (Brief for the Appellants, pp. 45-46) that the Commission is empowered by Section 15(6) to fix "*varying divisions between different carrier connections for similar services via the same gateway between the same points*" which "are *not prohibited* by Section 3(4);" they contend, however, that it is unnecessary to reach this question.

In other words, they urge the Court to make a comparison without examining the factual and legal nature of the matters compared. The simple comparison of unlike objects, of course, establishes nothing. It cannot result in any valid conclusion.

Some of the different circumstances surrounding divisions are discussed by the Court in *New England Divisions Case*, 261 U. S. 184, at p. 195:

> "The argument is that a division * * * is essentially a partition of property; that the rate must be divided on the basis of the services rendered * * * But the argument begs the question. What is its just share? —It is the amount properly apportioned out of the joint rate. That amount is to be determined, not by an agreement of the parties or by mileage. It is to be fixed by the Commission * * * at what that board finds to be just, reasonable, and equitable * * * It may be just to give the prosperous carrier a smaller proportion of the increased rate than of the original rate."

Furthermore, as a matter of common sense, the two are not comparable. A carrier may, subject to the Commission's approval, establish whatever rate it desires between any two points on its own line, but in entering into joint rates, it has no such freedom. The matter be-

comes one of negotiation, having in mind the provisions of Section 15 (6). One of the considerations in Section 15 (6), it will be noted, is "whether any particular participating carrier is an originating, intermediate, or delivering line." Certain rail lines in the southwest originate this traffic; appellants do not.

In view of the substantial difference in the nature of divisions as opposed to rates, it is clear that a simple comparison of the two cannot result in any valid conclusion as to the lawfulness of either. Since it is the comparison itself which is invalid, it is obviously immaterial whether the party seeking the comparison is a shipper or a carrier.

Appellants, as previously noted, admit that the Commission could fix varying differentials for similar services between the same points. Obviously then, a division may legally vary from the local rate between the same points. The conclusion inevitably follows that a difference shown by a simple comparison between the two *does not establish discrimination as a matter of law,* and cannot, therefore, be relied upon as reversible error here.

There is much to suggest that appellants are not truly interested in the question of rates versus divisions, for it does not, by their own admission, provide the solution to their alleged difficulties. It is the appellants' insistence on maintaining their inflated barge factor that prevents their participation in the traffic. This is convincingly demonstrated by the statement of appellants' counsel at the oral argument that while the prescription of a proportional in the amount of the rail division would remove the alleged discrimination, it was not what the barge lines desired (R. 147-148). Such a rate, moreover, would also be available to the traffic of all carriers not parties to joint rates. Thus, the appellants (for whom the alleged discrimination would have been cured by their own admission) would still be faced with the same and only difficulty they faced at the beginning—a barge contract carrier rate substantially below their own.

Under the guise of "public interest" appellants sought the establishment of a through route and joint barge-rail rate which would permit them to compete with the barge contract carrier at the expense of the railroads.

The Commission refused to aid in such a gross perversion of the National Transportation Policy. The Court below, on the merits, did likewise. This Court should do no less.

Conclusion

The judgment of the lower court should be affirmed.

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Proof of Service.

In compliance with the applicable provisions of the Revised Rules of the Supreme Court of the United States, I, John A. Daily, attorney for certain appellees on whose behalf the foregoing Brief is submitted, and a Member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing document on counsel for the several parties to this proceeding, as follows:

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This, the 9th day of March, 1956.

JOHN A. DAILY

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No. 233

In the Supreme Court of the United States

OCTOBER TERM, 1955

DIXIE CARRIERS, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA ET AL.

N APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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28 U. S. C. 1253, 2101 (b) and 2325. Probable jurisdiction was noted October 10, 1955 (R. 152).

QUESTION PRESENTED

The questions involved in this appeal are:

1. Whether the failure and refusal of a railroad to establish and maintain through routes and joint rates with a water carrier, while participating in such routes and rates with another rail carrier, is a violation of sections 3 (4) or 307 (d) of the Interstate Commerce Act (49 U. S. C. 3 (4)).

(a) Whether the joint barge-rail rates sought by the appellant barge lines are required in order to carry out the National Transportation Policy, and was the Commission required to find that such rates are necessary or desirable in the public interest.

2. Whether the discrimination prohibited by section 3 (4) of the Act results when a railroad demands its full local rate on traffic received from a barge line connection while accepting as compensation for a similar service a lesser amount, in the form of a division of a joint through rate on such traffic received from a rail connection, under a joint agreement.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act involved are set forth in the Appendix, *infra*, pp. 66–72.

STATEMENT

This is a direct appeal from a final judgment of a specially constituted District Court, sustaining a report and order of the Interstate Commerce Commission issued in a proceeding entitled No. 30731, *American Barge Line Company et al. v. Chicago & Eastern Illinois Railroad Company* (R. 46–55).[1]

The complaint against the railroads was filed with the Commission on December 31, 1950. It alleged that the refusal of the intervening appellee railroads to establish and maintain reasonable through routes and joint rates on sulphur with appellant water carriers from Galveston, Texas, to Danville, Illinois, is in violation of sections 1 and 307 (d) of the Interstate Commerce Act; and that these railroads are maintaining rates and charges which are discriminatory against appellants, in violation of section 3 (4) of the Act. The Commission was asked to require the railroads to cease and desist from the alleged violations, and to establish such barge-rail routes and joint rates on sulphur from Galveston to Danville as the Commission may deem to be rea-

[1] The complaint was filed by the American Barge Line Company, Federal Barge Lines, Coyle Lines, Inc., and Dixie Carriers, Inc., operating over through water routes between Galveston, Texas and East St. Louis, Illinois, against the Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad Company, The New York Central Railroad Company and the Wabash Railroad Company, operating between East St. Louis, Illinois, and Danville, Illinois.

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 233

DIXIE CARRIERS, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA ET AL.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially constituted district court of three judges is reported at 129 F. Supp. 28 (R. 46–55). The report of Division 3 of the Interstate Commerce Commission is reported at 287 I. C. C. 403 (R. 22–28). The report of the entire Commission on reconsideration is reported at 291 I. C. C. 422 (R. 29–35).

JURISDICTION

The final judgment of the district court was entered February 16, 1955 (R. 55). Appellants' motion for a new trial was denied by order of the district court on March 28, 1955 (R. 60). Notice of appeal was filed on May 17, 1955 (R. 1). The jurisdiction of this Court is invoked under

sonable and just and otherwise lawful (R. 62–64).

Following a hearing before a Commission examiner a proposed report was issued. In the report the examiner recommended that the Commission find the combination barge-rail rate applicable on sulphur from Galveston, interchanged by the barge lines to rail carriers at the port of East St. Louis for movement to Danville, is unreasonable; that the rail carriers, by accepting less than their local rate on sulphur, interchanged with rail connections at East St. Louis for movement to Danville, while charging the full local rate on traffic interchanged to them from appellant barge lines, constitutes discrimination in violation of section 3 (4) of the Act (R. 10–21).

Division 3 of the Commission did not follow the recommendation of the examiner. It found that (1) the evidence did not warrant a finding that the present through barge-rail rate is unreasonable or otherwise unlawful, and afforded no basis for a finding of unlawful discrimination under section 3 (4) of the Act; and (2) that the establishment of through routes and joint rates, as sought, is not shown to be necessary or desirable in the public interest (R. 22–28). These findings were sustained by the entire Commission on reconsideration (R. 29–35).

FACTS FOUND BY THE COMMISSION

The American Barge Line and the Federal Barge Lines, Inc., engage in common carrier

service by barge on the Mississippi River, serving among others the ports of New Orleans and Port Sulphur (about 60 miles south of New Orleans) (R. 77), on the one hand, and East St. Louis, Ill., on the other. The Coyle Lines, Inc., and Dixie Carriers, Inc., operate a common carrier barge service from Galveston, Texas, to New Orleans via the Intracoastal Canal and join with the American and Federal barge lines in rendering service on the Mississippi River in the publication of through routes and joint barge-rates on sulphur from Galveston to East St. Louis. The distance by water from Galveston to New Orleans is 357 miles and from New Orleans to East St. Louis it is 1,049 miles, or a total distance of 1,406 miles (R. 23).[2]

The sulphur involved herein originates at mines located in southeastern Texas, at such points as New Gulf, about 60 miles from Galveston (287 I. C. C. 405), and any shipment utilizing barge service would have to be moved by rail from the mine to Galveston and there transferred to barge. After movement by water to East St. Louis the sulphur would have to be transferred from barge to rail for the final leg of the journey to Danville.

The railroads can and do transport the sulphur the entire distance from the mines to Danville,

[2] The rail distance from East St. Louis to Danville, Illinois, is 184 miles, which makes the barge-rail distance from Galveston to Danville 1,590 miles.

which is approximately 1,034 miles. The sulphur originating at the Texas mines moves by rail to East St. Louis and there is delivered to the intervening appellee railroads for movement to Danville. Approximately 20,000 tons of sulphur moves annually from the mines in the Galveston area to Danville but no part of the movement has been made over the barge lines involved. There has been no movement on the assailed barge-rail combination rate. During the last 6 months of 1950, the preponderance of the sulphur traffic from Galveston to Danville moved by barge to East St. Louis and rail beyond. This traffic was not handled by appellee barge lines but by a contract water carrier which has discontinued operations. At present the sulphur is moving over all-rail routes from origin to destination (R. 24). There are no joint barge-rail rates in effect from Galveston to Danville or to any other point.

The combination all-rail rate on sulphur from the mines or from Galveston to Danville is $11.686 (comprised of $8.736 from the mines, or Galveston, to East St. Louis, plus the local rate of $2.95 from East St. Louis to Danville), while the combination barge-rail rate from Galveston to Danville is $8.27 (comprised of $5.32 from Galveston to East St. Louis by barge, plus the local rail rate of $2.95 from East St. Louis to Dan-

ville).[3] This makes a differential in favor of the Barge lines of $3.416. The all-rail joint through rate, from the mines or from Galveston of $9.184, is to be compared with the combination barge-rail rate of $8.27, or a differential in favor of the barge lines of 91.4 cents.

In order to obtain a part of the sulphur movement the barge lines requested the Commission to approve the establishment of a joint barge-rail rate of $7.67 (in lieu of the combination barge-rail rate of $8.27) to be divided on the basis of $5.41 for the barge lines, and $2.26 for the rail lines. This proposed division of $5.41 would exceed the present barge rate from Galveston to East St. Louis by 9 cents per ton (R. 24–25).

The Commission found that the record did not justify a finding that the present combination barge-rail rate, 91.4 cents lower than the present joint all-rail rate ($9.184—$8.270=91.4 cents) is

[3] As the Commission pointed out (R. 22) the price of sulphur at Galveston is $1.50 per ton higher when loaded in barges than when loaded in rail cars at the mines. This higher price reflects, in part, the rail rate of $1.10 from the mines to Galveston, and the unloading from cars to storage bins, transfer from bins to barges, wharfage, stevedoring, and pier rental (R. 23).

The barge lines do not absorb any portion of the cost of transporting the sulphur from the mines to, and loading it in, the barges at Galveston. However, they do absorb from the joint barge rate of $5.32 the cost of switching the loaded cars from the barge terminal at East St. Louis which amounts to approximately 30 cents per ton (R. 12), and are willing to absorb the charges incident to transfer to rail cars at E. St. Louis (R. 24).

unreasonable (R. 30). It also found that the evidence did not afford a basis for a conclusion that the proposed difference sought by appellants (differential) of $1.514 ($9.184–$7.670=$1.514), between the present all-rail rate from Galveston, and the suggested barge-rail rate from Galveston, or any particular differential, is required to remove the alleged discrimination against the barge lines (*id.*). The Commission further found that the record before it did not warrant a finding that the present barge-rail rate was unreasonable or otherwise unlawful for the service offered and afforded no basis for a finding of unlawful discrimination under section 3 (4) of the Act (R. 26–27).

CONTENTIONS OF APPELLANTS

Appellant barge lines contended in the Commission proceedings that their proposed joint barge-rail rate from Galveston to Danville of $7.67 (to be divided $5.41 for the barge lines and $2.26 for the rail lines) would be on a reasonable basis and should be made in view of the fact that the railroads' division of the joint barge-rail rate (previously established and now in effect) from Port Sulphur to Danville is $2.26 (R. 25).

Appellant barge lines further contended that the failure and refusal of the appellee railroads to establish and maintain joint through routes and rates on sulphur from Galveston to Danville with the barge lines, with "reasonable" differentials under the all-rail rates, is discriminatory

against them as connecting carriers and in favor of the connecting carriers by railroads with which they participate in through all-rail routes and joint rates, and is a violation of section 3 (4) of the Act (R. 22).

PROCEEDINGS IN COURT BELOW

Appellant barge lines filed suit against the United States and the Interstate Commerce Commission to enjoin and set aside the order of the Commission (R. 3–9). The Commission filed its answer to the complaint (R. 36–38) and the railroads, having been permitted to intervene as defendants (R. 40–41), filed their joint answer seeking to uphold the Commission's order (R. 39–40). The United States, assuming a neutral position in the case, filed its answer, neither admitting nor denying the allegations of the complaint (R. 35). The United States has joined the barge lines in this appeal and now seeks to have this Court reverse the decision of the court below, which, without dissent, upheld the findings and conclusions of the Commission. Probable jurisdiction was noted by this Court on October 10, 1955 (R. 152).

SUMMARY OF ARGUMENT

I

What the appellant barge lines sought in their complaint before the Commission was the establishment of through joint barge-rail routes and

rates with "reasonable" differentials under the all-rail joint rates, on sulphur from Galveston, Texas, to East St. Louis via barge and thence to Danville, Illinois, via rail. Specifically, the complaint before the Commission alleged only that appellee railroads had failed to establish reasonable through routes and joint rates with the barge lines in violation of section 1 (4) (which makes it the duty of the railroads to establish reasonable through routes and rates with other railroads and with common carriers by water), and section 307 (d) (which requires the Commission to prescribe through routes and joint rates for the transportation partly by rail and partly by water when found to be in the public interest), and with maintaining rates and charges discriminatory against the barge lines in violation of section 3 (4) (which prohibits discrimination between connecting carriers, including water carriers). These allegations thus constituted the issues in the Commission proceedings. The contention of the barge lines now appears to be that the relief they seek can be granted under section 3 (4). It is readily apparent that the provisions of section 3 (4) do not authorize or empower the Commission to compel through routes and joint rates, differential or otherwise.

With respect to these issues, it must be pointed out that the only power of the Commission to establish through routes and joint rates is to be found in sections 15 (3) and 307 (d) of the Act.

This power is limited. The Commission can do so only under either of these sections, after a full hearing followed by a finding that such routes and rates are necessary or desirable in the public interest. Its power to prescribe a differential rate favorable to a water carrier is limited by the provisions of section 307 (d) to instances where through rail-barge routes already exist and then only when, after hearing, it is able to find that such rates are "justified" and are "necessary or desirable in the public interest." The Commission found that the establishment of through routes and joint differential rates, as sought, is not shown to be necessary or desirable in the public interest. This finding is supported by substantial evidence which is not in dispute in this appeal. It is understood from the brief of appellant barge lines (pp. 11–12) that they are seeking review only of the issue of alleged discrimination under section 3 (4) of the Act.

II

Having failed in their effort to prove that through routes and joint rates were necessary or desirable in the public interest under section 307 (d), as they set out to do before the Commission, the barge lines have changed their theory of the case by contending now that discrimination exists under section 3 (4) as a matter of fact, and of law, because appellee railroads refuse to enter into joint rates on as favorable a basis with the

barge lines as the joint all-rail rate level which they maintain with their connecting rail lines. The issues raised by these appellants in their complaint before the Commission cannot be severed from the Commission's decision and must be reviewed as a whole on this appeal. They form the basis of both the Commission's decision and that of the district court.

In their attempt to prove discrimination, the barge lines rely on the decision of the Commission in the *"Ogden Gateway" case* (*Denver & R. G. W. R. Co.* v. *Union Pac. R. Co.*, 287 I. C. C. 611). That case is readily distinguishable. There the Union Pacific had established the same joint rates with the Bamberger Railroad as applied to numerous other railroads but refused to do so with the Rio Grande, which wanted equal rates with the others. In the instant case the barge lines want more than joint equal rates. They want a particular rate—one that would be lower by the amount of the division of the joint through all-rail rate.

Furthermore, the *"Ogden Gateway"* case admittedly involved other and greater issues. Although the Commission's decision in that case was affirmed by the district court as to this and some other issues raised, yet the court reversed the Commission as to still other issues. The appeals taken to this Court from that decision have not as yet been determined. (October 1955 Term, Nos. 117–119, 332–334.)

The other decisions cited and relied upon by the barge lines to prove discrimination under section 3 (4), are likewise distinguishable. Each case must stand on its own facts. The Commission, in the instant case, found from the evidence that a violation of section 3 (4) had not been shown. Under different facts and under different circumstances, it was found in the *Ogden Gateway* case that there was a violation of section 3 (4). This Court has held in a number of cases, including *Robinson* v. *Balt. & Ohio R. R.*, 222 U. S. 506, and *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247, that whether differences in rates result in unjust discrimination is a question of fact for the determination of the Commission. What amounts to undue preference or prejudice or discrimination is a question of fact with which the Commission was created to deal, not one of law. *United States* v. *Louisville & Nashville R. R. Co.*, 335 U. S. 314, 320; *Pennsylvania R. R. Co.* v. *United States*, 236 U. S. 351, 361; *Interstate Commerce Commission* v. *Delaware, L. & W. R. R.*, 220 U. S. 235, 255. A finding that discrimination is unjust is a finding of fact. *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481.

There is no merit to appellants' claim that the Commission has misconstrued or misapplied the provisions of section 3 (4) of the Act, in reaching its ultimate conclusions in this case.

III

The argument of appellant United States that joint barge-rail rates are necessary to carry out the National Transportation Policy, and that the Commission was required under section 307 (d) of the Act to find that the establishment of such rates were "necessary or desirable in the public interest," is without substance. The suggestion that the barge lines have an "inherent advantage" over the railroads with respect to the movement of the sulphur here involved, is not supported by the record.

The fact is that the railroads can and do transport sulphur the entire distance from the Texas mines to Danville, Illinois. The originating southwest rail carriers move the sulphur to East St. Louis, Illinois, where it is interchanged with appellee rail lines for movement to Danville. The interchange at East St. Louis involves merely the switching of the cars from one railroad to another. No transfer of lading is involved.

In order to utilize the proposed barge-rail route, it would be necessary to move the sulphur by rail from the mines to Galveston, where it would have to be unloaded from rail car to storage bin and loaded from storage bin to the barge. After the barge movement to East St. Louis, it again would be necessary to unload the sulphur from the barge and load it into rail cars. Obviously this would entail wasteful transportation.

Under these circumstances it is difficult to see how the barge lines could have an "inherent advantage" over the railroads on the sulphur traffic. The "inherent advantage" contemplated by the National Transportation Policy preponderates in favor of the railroads. The Commission considered such circumstances and found that the National Transportation Policy did not require it to compel the railroads, that originate the traffic, to relinqish their long haul (over 1,000 miles) to the barge lines and accept instead a short haul of only 240 miles (60 miles from the mines to Galveston and 180 miles from East St. Louis to Danville) in favor of a barge haul of 1,400 miles from Galveston to East St. Louis over a circuitous route.

It has never been, and is not now, the policy of Congress, as reflected in any declaration or in any statute enacted by it, to require rail carriers to surrender their "natural advantages" in order to favor water carriers. On the contrary, Congress intended in all of its pronouncements to preserve such advantages.

The argument of the barge lines and the United States is that the Commission must compel appellee railroads to enter into "reasonable" joint differential rates with the barge lines (although the combination barge-rail rate of $8.27 is lower by $3.41 than the combination all-rail rate of $11.68, and lower than the joint all-rail rate of $9.184 by 91.4 cents per ton) merely because the

cost of barge carriage, as compared with that of the railroads, is cheaper. They argue that the savings in costs must be passed on to those who ship by barge. In support of this argument they rely on this Court's decision in *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567. That case clearly is distinguishable and is not controlling.

The *Mechling* case was concerned with proportional rates paid by the shipper, as one of the components of a combination rate, which were higher on ex-barge grain than on ex-rail grain. The grain traffic there concerned moved over through routes and at proportional rates. There were no single factor rates involved or any question of divisions of joint rates. This Court, on the facts in that case, found that the rates approved by the Commission, higher on ex-barge than on ex-rail or ex-lake, were discriminatory and that such rates prevented the preservation of the "inherent advantages" of water transportation in violation of the National Transportation Policy. That was the main holding in the case.

The "inherent advantages" found by this Court to favor the barge lines in the *Mechling* case certainly cannot be found to favor the barge lines in the instant case. The legislative history fully supports this view. There is nothing in the National Transportation Policy that would require the Commission to make any findings different from those it has made in the instant

case. Neither is there anything in section 307 (d) that requires the Commission to find that it was "necessary or desirable in the public interest" that joint barge-rail rates should be established and differential rates fixed in order to take the sulphur away from the railroads and turn it over to the barge lines.

IV

Appellant barge lines have further changed the theory of their case, as relied upon in the Commission proceedings, by now contending that discrimination prohibited by section 3 (4) of the Act results when appellee railroads demand their full local rate of $2.95 on ex-barge sulphur received at East St. Louis for movement to Danville, while accepting as compensation from their rail connections at that point a lesser amount in the form of a division of a joint through rate. This contention is without substance. Under this theory a division of a joint all-rail rate would be the same thing as a rate or charge to be treated the same as a published rate or charge paid by a shipper.

First, the issue of whether divisions of joint rates between carriers, are rates within the meaning of section 3 (4) of the Act, was not raised by the complaint before the Commission or relied upon by the barge lines. The record shows that at the oral argument of the case before the Com-

mission counsel for the barge lines stated that he did not think this was one of the issues of the complaint because the barge lines were seeking joint through rates "to cure the discrimination." Therefore, since the question was not actually raised by the complaint before the Commission, and if raised was not pressed, but in fact waived, it should not be considered upon review. *United States* v. *Hancock Truck Lines, Inc.*, 324 U. S. 774; *General Transportation Co.* v. *United States*, 65 F. Supp. 981, affirmed *per curiam* 329 U. S. 668; *United States* v. *Tucker Truck Lines*, 344 U. S. 33.

Even assuming that this issue was properly before the Commission, it is well settled that a division of a joint through rate is not a "rate" or "charge" as those terms are used in section 3 (4) of the Act. Therefore, a finding of discrimination could not be based on that section. The Commission distinguished the terms divisions and rates in its report on reconsideration, pointing out that the comparison between them is of unlike things. Divisions of joint rates are the results of contractual arrangements between carriers, and are not required to be published. *Chase & Co.* v. *New York Central R. Co.*, 161 I. C. C. 614. The cases of *Western Pacific R. R. Co.* v. *Southern Pacific Co.*, 55 I. C. C. 71, and the *Mechling* case, *supra*, relied upon by the barge lines, are distinguished by the Commission and are not controlling.

The distinction between rates and divisions of joint rates is further emphasized by the fact that when Congress amended section 15 of the Interstate Commerce Act in 1920, giving the Commission for the first time definite powers over divisions of joint rates (which theretofore had been uncertain), it set forth in section 15 (6) certain standards or criteria by which the Commission was to be governed in prescribing divisions. Before such divisions may be challenged an appropriate action would have to be instituted under the provisions of that statute.

The Commission has held uniformily that a comparison of a division of a joint rate or a local rate is not a proper test of either. *Board of Trade of Troy, Ala.* v. *Ala. Mid. Railway Co.*, 6 I. C. C. 1; *Bituminous Coal to Youngstown*, 163 I. C. C. 3, 12. This Court held in *Parsons* v. *Chicago & Northwestern Ry.*, 167 U. S. 447, 457, that the fact a portion of a through joint rate received by one of the carriers, party thereto, may be less than its local rate, is not questioned.

The claim of appellant barge lines that the district court did not pass upon the question of whether a division of a joint rate is a rate, within the meaning of section 3 (4) of the Act, or upon the question of discrimination under that section, is without merit as that court specifically found that "When the whole record is considered in the light of all the provisions of the Act, and many cases construing same, we think Plaintiffs have

not shown their claim of discrimination to be meritorious." (129 F. Supp., pp. 28.)

ARGUMENT

I

The failure and refusal of the railroads to establish through routes and joint differential rates with appellant barge lines is not a discrimination prohibited by Section 3 (4) of the Act nor a violation of Section 307 (d), or in contravention of the National Transportation policy

As we understand the appeal, appellant barge lines do not here question the "fact as to reasonableness and public interest, questions as to which appellants did not assert error within the scope of judicial review," in their suit in the court below. (Jurisdictional Statement, p. 9.) As shown in the Statement, p. 8, appellants there "sought judicial review only as to the correctness of the Commission's construction of section 3 (4) of the Act." No review was sought with respect to the allegation of reasonableness of the rail rates or the establishment of through routes. In their brief in this Court the barge lines state (pp. 11–12) that "no further note" will be taken "of those allegations nor of the proof with respect thereto," but instead the brief will primarily be concerned "with the issue of alleged discrimination between connecting carriers in violation of section 3 (4)."

Appellant barge lines challenge the validity of the order, here under review, only on two

grounds: First, that the order is discriminatory in fact and as a matter of law, under section 3 (4) of the Act, because it approves the refusal of the appellee railroads to enter into joint rate arrangements with the appellant barge lines while joining in such arrangements with connecting railroads; and second, that the order is discriminatory in fact, under section 3 (4), because it permits the appellee railroads to accept from their connecting rail lines, as compensation for the same or similar service, a lesser amount in the form of a division of joint rates than they demand and receive from connecting barge lines on shipments of sulphur. (Barge Lines' Brief, pp. 23 and 34, respectively.) Included in the first proposition is the issue of whether the Commission was required, under the evidence of this case, to establish differentials in the barge-rail rates under the all-rail rates. The second proposition involves the question of whether a division of a joint through rate is a "rate" or "charge" within the meaning of those terms as used in section 3 (4) of the Act.

In supporting the first of the two grounds upon which the barge lines rely for reversal of lower court, the appellant United States takes the position, in its brief (p. 18 et seq.), that the railroads' refusal to establish "joint rail-barge rates" resulted in reducing the barge lines' "inherent advantages" and, therefore, the Commission is required to find that the establishment of

such rates is "necessary or desirable in the public interest" under section 307 (d) of the Act, regardless of whether or not a shipper supported the barge lines' request for such rates, or appeared and testified.

A. The Commission's order does not violate Section 3 (4) of the Act in failing to require appellee railroads to enter into through routes and establish joint differential rates with appellant barge lines

The first question attempted to be raised by appellant barge lines on this appeal (brief, p. 23) is whether it is unlawful, under section 3 (4) of the Act, for a railroad, while participating in through routes and joint rates with another connecting rail carrier, to refuse to participate in similar routes and rates with a connecting water carrier, seeking to engage in the same through transportation. In dealing with this question these appellants take the position that it is unlawful per se, under section 3 (4) of the Act, for a railroad to refuse to join in through routes and joint rates with a water carrier when it has already joined in such routes and rates with a connecting rail line (*id.*).

As heretofore pointed out the relief the barge lines sought before the Commission apparently was the establishment of through routes and joint rates as a means of removing the alleged discrimination (*supra,* p. 3). The barge lines now contend that the relief they seek can be granted under section 3 (4) of the Act. They are mistaken in this contention. It is readily apparent

that the provisions of section 3 (4) do not authorize the Commission to compel through routes or joint rates, differential or otherwise. Section 3 (4) prohibits carriers subject thereto from discriminating in their "rates, fares, and charges between connecting lines," including carriers by water subject to Part III of the Act. The word route is not mentioned in that section.

We do not mean to say that the Commission may not require the removal of discrimination when found to exist under section 3 (4). The procedure by which this is done is by issuing an order directing the carrier to remove the discrimination, and if the carrier fails to do so then the Commission may prescribe a reasonable nondiscriminatory rate under section 15 (1). But the Commission may make such an order in either case only after hearing and upon a finding supported by substantial evidence. There was a hearing in this case at which evidence was presented, from which the Commission found that the allegation of discrimination had not been sustained.

But the complaint of appellant barge lines before the Commission charged only that appellee railroads had failed to enter into through routes and reasonable joint rates with the barge lines, in violation of sections 1 and 307 (d) of the Act, and that the railroads were maintaining rates that are discriminatory against the barges in vio-

lation of section 3 (4) (R. 63, 64).[4] Pursuant to that prayer the Commission conducted an investigation and held a hearing and considered appellant's request that the railroads be required to establish "such through routes and joint rates, as the Commission may deem reasonable and just." (*id.*)

From the foregoing, it is believed clear that the question actually raised on the record is whether the Commission erred in finding that (1) the evidence before it would not warrant a finding that the present through barge-rail rate is unreasonable, and affords no basis for a finding of unlawful discrimination under section 3 (4) of the Act, and (2) that the establishment of through routes and joint rates as sought are not necessary or desirable in the public interest. The order actually sought was under sections 1 and 307 (d). See *St. Louis S. W. Ry Co.* v. *United States*, 245 U. S. 136, 145.

With respect to the issues before the Commission we must point out that the only power of the Commission to establish through routes and joint rates is to be found in sections 15 (3) and 307 (d) of the Act.[5] It will be observed

[4] This reference to discrimination in charges relates to the allegation that the railroads refuse to establish through routes and joint rates with the barge lines.

[5] Section 15 (3) of the act provides in applicable part: The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative with-

from the provisions of section 15 (3) as well as section 307 (d), that the Commission's power to prescribe through routes and joint rates is limited. It can do so only under these sections when it finds after a full hearing that such routes and rates are necessary or desirable in the public interest. In connection with the provision under section 307 (d) the Commission is only required "In the case of a through route, where one of the carriers is a common carrier by water," to prescribe "such reasonable dif-

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out complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. * * *

Section 307 (d) of the act provides in part:

The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water. * * *

ferentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water," when found to be in the public interest. The Commission could not prescribe differential rates sought by the barge lines because of the absence of through routes. In any event the record shows that there was no evidence introduced by any shipper that either through routes or joint differential rates were necessary or desired (R. 25, 31).[6]

In the absence of substantial evidence the Commission could not require through routes and joint differential rates. In any event, before joint rates could be prescribed through routes must be established except that a joint rate could be prescribed over a claimed through route when the Commission determines it could have required the carriers to establish a through route originally or if it is necessary or desirable in the public interest. *Western Pac. R. R. Co.* v. *Northwestern*

[6] The statement at page 9 of appellant barge lines' brief that "At the request of the shipper, the appellants asked the railroad appellees to join them in a joint barge-rail rate on sulphur from Galveston to Danville" is of no evidentiary value in proving public interest. Neither does the statement at page 10 of their brief, that "the shipper advised that under the proposed barge-rail rate the barge lines would get some sulphur from Galveston", aid in proving such interest. Such hearsay evidence is relied upon by the United States in its brief at p. 14 as proving public interest. Neither this shipper nor any other shipper offered any testimony in the case.

Also the Commission found (R. 30) that there was no evidence that any differential is required to remove the alleged discrimination.

Pac. R. Co., 191 I. C. C. 127, 131; *Georgia & F. R.* v. *Atlantic Coast Line, ibid.*, 489, 499. While through routes may exist without joint rates the converse is not true. *United States* v. *Great Northern Ry. Co.*, 343 U. S. 562, 573; *Thompson* v. *United States*, 343 U. S. 549, 558.

In applying Section 307 (d) to the instant case that section must be considered in connection with Section 15 (3). Therefore, before the Commission can prescribe the joint differential rate and through route sought by plaintiffs under these sections the evidence must show that such relief is "necessary or desirable in the public interest." *Chicago, R. I. & P. Ry. Co.* v. *United States*, 274 U. S. 29, 36. No such showing was made in this case.

The Commission held in the very early case of *Empire Steel & Iron Co.* v. *Director General*, 56 I. C. C. 158, that whether joint rates must be ordered, established, and maintained, depends upon such matters as public demand or necessity and whether or not the absence of joint rates is detrimental or obstructive to the public interest. In *Wool Rates Investigation, 1923*, 120 I. C. C. 493, the Commission held that the public interest must be considered broadly; that the interests of producers, consumers, and carriers must all be considered. Although the decisions in these cases pertain to railroads, they are equally applicable to water carriers.

In *Inland Waterways Corp. and Other Common Carriers*, 153 I. C. C. 129, among others, the Commission held that its power to require through routes and joint rates in connection with barge lines is limited to cases in which it deems such rates and routes are necessary and desirable in the public interest.[7] See also *Inland Navigation Co.* v. *Big Creek & Telocaset R. Co.*, 281 I. C. C. 515.

The instant case is on all fours with the *Algonquin-Missouri Chemical Corp.* v. *A. T. & S. F. Ry. Co.*, 286 I. C. C. 307 (cited by both Division 3 (R. 26) and the entire Commission (R. 30–31)), wherein it was found that the establishment of a joint differential barge-rail rate on sulphur from Port Sulphur to DeSoto, Kans., was not shown to be necessary or desirable in the public interest (under almost identical allegations, facts and issues as here) and that the allegation there made of discrimination under Section 3 (4) of the Act, had not been sustained, although a shipper supported the complaint. As pointed out by the Commission (R. 26–27), the provisions of Section 307 (d) require it to prescribe joint rates for the transportation partly by rail and partly by water in instances where it is shown that such rates are necessary or desirable in the public interest.

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[7] In its interpretation of the meaning of the words "consistent with the public interest," as contained in the proviso of Section 15 of the Act, the Three Judge Court in *Pennsylvania R. R. Co.* v. *United States*, 54 F. Supp. 381, 390, held that the words "public interest" as used

In *Rail and Barge Joint Rates*, 270 I. C. C. 591, the Commission conducted an extensive investigation (covering a period of years) into the barge-rail rate structure. Its order entered therein, made pursuant to Section 307 (d), required common carriers by railroads and water to establish joint through routes for the transportation of property described in the report, and to establish, maintain and apply over such through routes the joint rates prescribed based upon certain differentials which it found to be justified. However, the Commission refused to require through routes and joint rates on bulk commodities, such as sulphur, saying (p. 618):

> Bulk commodities are largely handled in all-water service or on combination rates not under a common arrangement for through carriage, for the reason that quantities transported by barge must be larger than the ordinary carload in order to use the cargo-carrying space. Furthermore interior points generally do not have facilities for handling such large consignments. For that reason we shall not prescribe through routes and joint rates on bulk commodities.

The Commission's order in that case was challenged in court but was sustained by the District

refers to "the shipping public," and fairly interpreted "must be taken to include also considerations of railroad operating efficiency and economy." The Supreme Court approved this interpretation in its opinion on appeal of this case in 323 U. S. 588, 592–593.

Court in *Alabama Great Southern R. Co. v. United States*, 88 F. Supp. 982, and affirmed by the Supreme Court of the United States in an opinion found in 340 U. S. 216.

It is submitted that there is no more reason for making a different holding in regard to through routes and joint rates with differentials on a bulk commodity in the instant case than there was in the *Rail and Barge Joint Rates* case.

While the Commission's power to establish through routes and joint rates have been greatly extended since the enactment of the original act, the wording of section 3 (4) has remained substantially the same. The statutes presently applicable and in effect governing through routes and joint rates, including section 307 (d), do not authorize the Commission to establish such routes and rates unless the evidence shows that they are necessary or desirable in the public interest. Section 3 (4) does not apply for the purpose of establishing through routes, and it does not include within its terms any reference to routes. *Nicholson Universal & S. Co. v. Pennsylvania R. Co.*, 203 I. C. C. 637, 674.

As heretofore stated the barge lines sought through routes and joint differential rates before the Commission. They now contend that the Commission should prescribe something more than a joint rate (the railroads' joint rate is $9.184) as that would not be sufficient for their purpose. They desire to retain their local rate

of $5.32 from Galveston to East St. Louis and have the Commission prescribe a particular joint barge-rail rate of $7.67 from Galveston to Danville which they contended should be divided on the basis of $5.41 for the barges and $2.26 for the rail lines.

Having failed in their effort to prove that through routes and joint rates were necessary and desirable in the public interest under section 307 (d), as they set out to do before the Commission, the barge lines now change their theory of the case by contending that discrimination exists under section 3 (4) as a matter of fact and law. Their argument is that when appellee railroads refuse to enter into joint rates with the barge lines, while joining in such rates with connecting railroads, there is discrimination *per se*, because the combination rate applicable on the barge-rail traffic is not on as favorable a basis as the joint all-rail rate level in relation to the all-rail combination of local rates. The discrimination upon which the barge lines now rely is grounded upon the claim that the separately established rate paid by the shipper, on ex-barge sulphur beyond East St. Louis, is greater than the unpublished division of a joint through all-rail rate received by the rail carriers for the transportation beyond East St. Louis with respect to ex-rail sulphur moving from the same origin to the same destination. We shall show in subheading B of this

chapter, *infra*, that this contention is wholly untenable.

Appellants rely on the Commission's decision in the so-called *Ogden Gateway* case (*Denver & R. G. W. R. Co.* v. *Union Pac. R. Co.*, 287 I. C. C. 611) in attempting to prove that the mere fact that the appellee railroads refused to join the barge lines in joint rate arrangements, while extending them to connecting rail lines under similar conditions, resulted in discrimination in violation of section 3 (4) of the Act. That case is distinguishable.[5] There the Union Pacific had established the same joint rates with the Bamberger Railroad as applied to numerous other

[5] In that case the Commission stated (287 I. C. C. 619) that the paramount issue was whether the Ogden gateway should be made available to shippers for routing at joint rates equal to those over competitive routes of all traffic in connection with the Rio Grande between the areas involved, and that this issue falls within the limitations of section 15 (3) and (4). In addition, it stated, that evidence was presented bearing upon the issues of reasonableness of the assailed rates, discrimination between connecting lines for refusal of the Union Pacific to join in lower joint rates and undue prejudice against shippers using the Ogden gateway routes. It also stated, "These issues are closely related and will be considered together."

The Commission then found (p. 658) that there was "no substantial evidence as to transportation conditions over the established routes referred to" and that "a finding of discrimination under section 3 (4) of the Act must be supported by a showing that the transportation conditions are no less favorable over the routes alleged to be discriminated against than over the routes alleged to be preferred." It then stated that "No such showing has here been made."

rail carriers but refused to do so with the Rio Grande, which wanted equal rates with the others. In the instant case the barge lines want more than joint rates. They seek a rate that would be lower than the joint all-rail rate—one that would be at least lower by the amount of the division between the rail carriers of the joint through rate.[9]

The Rio Grande was seeking joint rates. In the instant case differential rates were sought which could only be authorized pursuant to the provisions of section 307 (d) of the Act. That section provides that "In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified." Therefore, it can only prescribe differentials in case *through routes exist,* and then only after it finds that the evidence warrants it.

Although the decision of the Commission in the *Ogden Gateway* case, admittedly involving other and much greater issues, was affirmed by the three-judge district court of Nebraska, inso-

[9] If rates could be predicated on the amounts of divisions of joint through rates, agreed upon by the carriers, subject to Commission approval under section 15 (6) (which must take into consideration several factors such as the efficiency of the carriers, the amount of revenue required to pay their operating expenses and the importance to the public of the transportation service of such carriers) the rate structures would be undermined because of the differing amounts of such divisions.

far as this particular issue was concerned, it was reversed as to some of the other issues. An appeal has been taken from the decision of this Court, October 1955 Term (Nos. 117-119, 332-334), which has not yet been argued.

The other Commission decisions cited and relied upon by appellant United States to prove that the failure of the railroads in the instant case to establish through routes and joint rates was discriminatory (Br. p. 33) are distinguishable from the instant case. In *Decatur Navigation Co.* v. *Louisville & Nashville R. Co.*, 31 I. C. C. 281, cited, the complainant sought an order of the Commission to compel the defendant railroads to join it in through routes and joint rates between certain Tennessee River landings, and points on the lines of the defendants and their connections, on the ground that the railroads maintained such routes and rates on shipments via the competitors of complainant line, while refusing to grant the same privileges to complainant. The Commission held that such refusal was discriminatory. That case is distinguishable from the instant case. The evidence supported such a finding. In the instant case, no through routes were in existence between appellee railroads (or any other railroad serving Galveston, Texas) and any barge line operating from that point via the Intercoastal Canal or over any other water route, to any point in the territory here involved, with

respect to shipments of sulphur or any other commodity as far as the record shows.

In *Pacific Navigation Co.* v. *Southern Pacific Co.*, 31 I. C. C. 472, cited by appellant United States, the complainant, operating steamers between San Francisco, San Pedro and San Diego, California, sought an order of the Commission requiring the defendant railroads to establish through routes and joint passenger fares with its steamers to the same extent as they maintained such routes and fares with complainant's competitors, the Pacific Coast Steamship Co. and the San Francisco & Portland Steamship Co. From the evidence before the Commission in that case it found that the refusal of the defendant railroads to maintain through routes and joint fares with complainant, while maintaining such routes and fares with its competitors, was a violation of section 3. In making this finding, the Commission observed (p. 479) that if railroads are permitted to choose the particular boat lines they will make arrangements with in establishing such routes and fares, they would be able to dictate who shall and who shall not operate on the water and drive rail competitors out of business. In the instant case no question of rail carriers favoring one water carrier over another is involved and there is no question of a railroad entering into through routes and joint rates with one water line serving Galveston while refusing to do so with respect to another. The Commission (p. 481) ordered the

rail defendants to establish through routes and joint fares and to cease and desist from the discrimination found to be unreasonable. That case is likewise distinguishable.

In *White Star Line* v. *N. Y. C. R. Co.*, 83 I. C. C. 473, the Commission found on the evidence in that case that the refusal of the defendant railroads, who participate in through routes and joint rates with the White Star Line from Port Huron and Detroit via Toledo to points on defendant railroads' lines, while maintaining such routes and rates with the Detroit & Cleveland Navigation Company, was unduly prejudicial (p. 478) and ordered the defendants to join complainant in establishing through routes and joint differential rates. It is, therefore, clear that that case is distinguishable from the instant case.

Appellant United States also relies on *Ann Arbor R. R. Co.* v. *B. & O. R. R. Co.*, 136 I. C. C. 578. That case is distinguishable. There the Commission found from the evidence before it that the failure of the Chesapeake & Ohio and the Norfolk & Western to participate with the Ann Arbor and its connecting lines in through routes and joint rates across Lake Michigan on coal from Virginia, West Virginia and Kentucky to destinations in Iowa, North and South Dakota, and Wisconsin while contemporaneously participating in such routes and rates east of Chicago with the Pere Marquette on like traffic from and to the same points via Chicago, was dis-

criminatory, in violation of section 3 of the Act. It ordered the discrimination removed by the establishment of through routes and joint rates.

The barge lines also cite and rely on (Brief, pp. 29–30) the Commission's decision in *U. S. War Department* v. *A. & S. Ry. Co.*, 92 I. C. C. 528. The holding in that case was that the Commission had the power not only to establish through routes in connection with barge lines, but also nondiscriminatory joint rail-barge-rail rates, and in determining what would be necessary to remove any discrimination in the rates found to exist, the Commission may require the rail lines, which form part of both routes, to join in a lower rate over the rail-barge-rail route (pp. 546–547). The evidence in that case supported the findings that the through routes and joint differential rates authorized were in the public interest. In the instant case, the evidence would not support such findings. Further, that case involved principally the question of reasonable divisions of joint rates established between the railroads and barge lines. That holding is not inconsistent with the Commission's decision in the instant case.

Each case must stand on its own facts, and the Commission in the instant case found from the evidence that a violation of section 3 (4) has not been shown. On different facts and under different circumstances it was found in the cases cited and relied upon by appellants that there was

a violation of section 3. *New York Dock Ry.* v. *Baltimore & O. R. Co.*, 32 I. C. C. 568; *Empire Steel & Iron Co.* v. *Director General*, 56 I. C. C. 158; *Chicago, M. & St. Paul Ry. Co.* v. *Union Pac. R. Co.*, 88 I. C. C. 312.

If discrimination under section 3 (4) could have been found on the evidence in this case, the Commission may have ordered the carriers to remove it themselves, or by resort to section 15 (1) of the Act which empowers it to "determine and prescribe" what will be the just and reasonable rate, and to order the carriers "to cease and desist" from such violation.[10] It was incumbent upon the barge lines to prove discrimination which they failed to do. This Court held in *Virginian Ry.* v. *United States*, 272 U. S. 658, 663, that:

> Whether a rate is unjustly discriminatory is a question on which the finding of the Commission, supported by substantial evidence, is conclusive, unless there was some error in the application of rules of law. *Western Paper Makers' Chemical Co.* v. *United States*, 271 U. S. 268.

[10] Commission orders to remove discrimination usually do not fix the rates. The carriers are left free to remove the discrimination either by raising the lower rate, or by lowering the higher rate, or by doing both. *United States* v. *Illinois Cent. R. R. Co.*, 263 U. S. 515; *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, 651. If a carrier does neither the Commission may prescribe a reasonable nondiscriminatory rate under section 15 (1).

There is no merit to appellants' claim that the Commission has misconstrued or misapplied the provisions of section 3 (4) of the Act in reaching its ultimate conclusion and findings in this case.

B. The joint barge-rail rates sought by appellant barge lines are not required in order to carry out the National Transportation Policy

Appellant United States (Br. p. 17 et. seq.) contends that joint barge-rail rates are necessary to carry out the National Transportation Policy, and that the Commission was required under section 307 (d) of the Act to find that the establishment of such rates was "necessary or desirable in the public interest."

We do not deny that it has been the policy of Congress for many years to encourage and develop water transportation service and facilities in connection with the commerce of the United States, but that policy also has been to "foster and preserve in full vigor both rail and water transportation" (Transportation Act of 1920, Sec. 500, 41 Stat. 499). It is still the policy of Congress, "to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act, so administered as to recognize and preserve the inherent advantages of each" (Statement of National Transportation Policy, Transportation Act of 1940, 54 Stat. 898, 899).

We respectfully submit that it has never been and is not now the policy of Congress, as reflected

in any declaration, or in provision of law implementing any such policy to require rail carriers to relinquish their "natural" or "inherent" advantages in order to favor barge lines.

In support of its argument that the barge lines have the "inherent" or "natural advantage," with respect to the traffic involved in this appeal (because of the lower cost of barge carriage as compared with that of the railroads, and that the savings in the costs must be passed on to those who ship by barge (Br. p. 24 et seq.)), it relies on the decision of this Court in *Interstate Commerce Commission* v. *Mechling,* 330 U. S. 567. That case is distinguishable and is not controlling.

In the *Mechling* case the Commission's order specifically related to the railroad rate on grain transported from Chicago to New York, and other eastern points, after the grain had been moved to Chicago from the west by connecting rail carriers on through bills of lading. The rates applied on these shipments were combinations of distinctly separate charges for the shipment from the west to Chicago and from Chicago to the east. The charge fixed for the last leg of the shipment is a "proportional" or "reshipping" rate, which is lower from Chicago to the east than the "local" rate, i. e., the rate charged for a shipment from Chicago to the east which originates at Chicago.

The eastern railroads for many years had carried grain east from Chicago at a proportional or reshipping rate 8½ cents per 100 pounds

lower than the local rates. Prior to 1939, such rate had been the same for grain whether brought to Chicago by a connecting railroad, a connecting lake steamer, or a connecting barge. Because the barge lines could afford to charge cheaper rates on their movements to Chicago than the railroads, the grain traffic from localities served by the railroads shifted to the barges.

In 1939 the eastern railroads filed schedules with the Commission imposing on ex-barge grain the local rate from Chicago east, but allowed the ex-rail and ex-lake grain the benefit of the 8½ cent lower "proportional" or "reshipping" rates on eastern hauls. The result of this rate would have put the barge lines at a great competitive disadvantage with railroads in barge-served localities.

The Commission found the originally proposed 8½ cent higher rates for ex-barge grain to be unlawful, but concluded that the ex-barge grain rates east from Chicago would be reasonable and lawful even though they were 3 cents per 100 pounds higher than for ex-rail and ex-lake grain. The effect of the order was that the railroads could charge higher proportional or reshipping rates for ex-barge than for ex-rail or ex-lake grain.

The order, challenged in the District Court, was set aside to the extent it permitted the 3-cent extra charge. On appeal to this Court the lower court's decision was affirmed. This Court, after

reviewing the provisions of the Water Carrier Act of 1940, and discussing other provisions of acts of Congress as well as the Transportation Policy, stated (p. 577) that:

> The foregoing provisions flatly forbid the Commission to approve barge rates or barge-rail rates which do not preserve intact the inherent advantages of cheaper water transportation, but discriminate against water carriers and the goods they transport. * * * And section 307 (d), authorizing the Commission to fix differentials as between through water-rail and through all-rail rates, does not authorize the Commission to neutralize the effective prohibitions of the other provisions which were strengthened in 1940 expressly to prevent a discrimination against water carriers.

The Court held that it was not within the Commission's power to adjust rates, either to equalize the transportation cost of barge shippers with that of shippers who do not have access to barge service, or to protect the traffic of railroads from barge competition, and that Congress left the Commission no discretionary power to approve any type of rates which would reduce the "inherent advantages" of barge transportation in whole or in part. After stating (p. 578) that the Commission's order was not supported by its conclusion "that it is 'inequitable' for the barges to charge a much lower rate for the inbound grain

haul than the competitive western railroads can afford to charge for the same haul, resulting in barge-rail rates lower than all-rail rates from the same localities," the Court said (p. 579):

> * * * Furthermore, Congress has decided this question of equitable rates as between railroads and barges. It has declared in unmistakable terms that the "inherent advantage" of the lower cost of barge carriage as compared with that of railroads must be passed on to those who ship by barge. It is therefore not within the province of the Commission to adjust rates, either to equalize the transportation cost of barge shippers with that of shippers who do not have access to barge service or to protect the traffic of railroads from barge competition. For Congress left the Commission no discretionary power to approve any type of rates which would reduce the "inherent advantage" of barge transportation. Cf. *Mitchell* v. *United States*, 313 U. S. 80, 97.

It will thus be seen that this Court's decision in the *Mechling* case was influenced largely by that part of the National Transportation Policy proclaimed by Congress (54 Stat. L. 899), which requires that the Act must be "so administered as to recognize and preserve the inherent advantages" of "all modes of transportation subject to * * * this Act." The Court held on the facts in that case that a rate proposed by the railroads

(and approved by the Commission) on ex-barge grain arriving at Chicago for movement to eastern destinations, higher than that on ex-lake or ex-rail, was discriminatory and that such rate prevented the preservation of the "inherent advantages" of water transportation in violation of the National Transportation Policy. That was the main holding in the case.

In the *Mechling* case the grain concerned originated at elevators either along or in close proximity to the Illinois Waterway, or at elevators similarly situated along other navigable waterways with which the Illinois Waterway is connected, e. g., trans-Mississippi River territory. (*Grain Proportionals, Ex-Barge to Official Territory,* 246 I. C. C. 353, 361.) The grain there was handled in such a way as to permit it to be accorded the benefit of proportional rates beyond Chicago.[11] The rates involved would have restricted their application on grain from Chicago, and other grain rate-break points, to eastern

[11] The Commission has defined a proportional rate as a part or a remainder or balance of the through rate. It has said that there must be an examination and consideration of the entire rate from point of origin or production to ultimate destination (*Grain Proportionals, Ex-Barge to Official Territory*, 246 I. C. C. 353, 370). In order to secure the benefit of such rate the original billing showing such data as origin of shipment, destination, charges paid, weight, etc., must be registered with the railroads' Inspection and Weighing Bureau, for use in connecting such shipments with outbound billing to points beyond the rate-break point, *id.*, pp. 372–373.

destinations so they would not apply on ex-barge (Illinois Waterway) traffic (248 I. C. C. 307). The traffic concerned moved over through routes and proportional rates. There were no single factor rates involved or any question of divisions of joint rates, or of short-hauling. The grain originated with the barge line and prior rail haul was not a factor of consideration as in the instant case.

In the instant case there are no through routes. The record is devoid of any evidence that a single shipment of sulphur on a through bill of lading ever moved via common carrier by water and rail from Galveston to Danville or that the railroads ever held themselves out, or entered into any agreement, with any water carrier to transport any sulphur between these points. *Thompson* v. *United States*, 343 U. S. 549, 551–561. Neither joint rates nor proportional rates can be established in the absence of through routes. *Western Pacific R. R. Co.* v. *Northwestern Pac. R. Co.*, 191 I. C. C. 127, 131; *Georgia & F. R.* v. *Atlantic Coast Line R. Co.*, 191 I. C. C. 489, 499.

In the instant case the proposed water-rail movement of sulphur from Galveston to Danville would be interspersed between two rail movements requiring a double transfer of lading. Since the railroads serve the mines and can, and do, transport the sulphur from the mines to ulti-

mate destination (Danville) in an all-rail movement, without unloading at interchange points (Galveston and East St. Louis) they have a natural advantage.

On any sulphur utilizing the proposed barge-rail service the railroads would have to move it from the interior Texas mines to Galveston, where it would have to be unloaded from rail car to barge (R. 23), and after the barge movement to East St. Louis it would then have to be unloaded from barge into rail cars (R. 24), which would be economically wasteful transportation. This is particularly true when the sulphur can be moved the entire distance by rail at a rate (shown by the record to be reasonable) which is lower than the rail-barge-rail rate and charge for the through movement.[12] The expense of the rail

[12] The present combination barge-rail rate is 91.4 cents lower than the present all-rail rate ($9.184−$8.270=91.4 cents). The joint barge-rail rate proposed by the barge lines is $7.67 (R. 24), which is lower by $1.514 than the present all-rail joint rate $9.148−$7.670=$1.514) (R. 30). The Commission held in its report on reconsideration (R. 30) that:

As was found by the division, the record affords no support for a finding that the present combination barge-rail rate, 91.4 cents lower than the present all-rail rate, is unreasonable for the through service offered thereunder. There also is no evidence affording a basis for a conclusion that the proposed difference of $1.514 between the present all-rail rate from Galveston and the suggested barge-rail rate from Galveston, or any particular differential, is required to remove the alleged discrimination against barge lines and to result in rates that would be consistent with the national transportation policy to preserve the inherent advantages of all modes of transportation. The complainants cite decisions in which

haul to Galveston and those incident to the transfer from rail car to barge at that point are not absorbed by the barge lines (R. 12). Such expenses would off-set the otherwise lower cost of Water Transportation.

The foregoing circumstances clearly reveal that there is no "inherent advantage" in using the water carrier service proposed and sought by appellants. We submit that the "inherent advantage" contemplated by the National Transportation Policy is in favor of the railroads.

In its decision the Commission shows that it considered the inherent advantages of water transportation in this case, where it stated (R. 27):[13]

> In reaching our conclusions herein we are not unmindful of the provisions of the national transportation policy, which call for fair and impartial regulation of all modes of transportation subject to the act, so administered as to recognize and preserve the inherent advantages of each. We do not believe, however, that this policy requires us to force rail carriers, where they maintain a depressed rate to meet water competition, to further depress their earnings on the traffic in order to favor that same form of competition. Danville

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such rate differences were prescribed, but the prescriptions were based upon a presentation of adequate evidence, which is not the case here.

[13] The report of Division 3, containing the above-quoted excerpt, was approved by the entire Commission on reconsideration (R. 33).

> is 184 miles from the end of the barge-line service, and the rail rate for that 184-mile haul is depressed at least from 13.5 to 9.2 percent of first class. If the barge lines can reasonably be expected to participate in this movement, the opportunity to do so should be afforded, not by the establishment of a through barge-rail rate differentially under an all-rail adjustment which is already severely depressed, but by a reduction in the barge rate from Galveston to East St. Louis, or by an increase in the depressed rail rate, or both. There is no allegation here that the all-rail rate, or any factor thereof, is unreasonably low.

The "inherent advantages" found to favor the barge lines in the *Mechling* case, certainly cannot be found to favor appellants in the instant case. The decisions of the Commission and the court below, finding that the *Mechling* case is not controlling and that no discrimination under section 3 (4) of the Act is shown, are correct and are supported by the law and the evidence of record. *Alabama Great Southern R. R. Co.* v. *United States*, 340 U. S. 216. These decisions are in harmony with the National Transportation Policy as revealed by the legislative history of that policy.[14]

[14] The legislative history of the National Transportation Policy, as expressed in the Transportation Act of 1940, reveals quite clearly that Congress never intended that the natural advantage the railroads have in the instant case

We are unable to find anything in the National Transportation Policy that would require the

should be extinguished by forcing them to relinquish such advantages to a competing water carrier.

In 84 Cong. Rec. at page 5883, the following appears:

"Mr. AUSTIN. So, if there is one type of common carrier which has a natural facility or a natural advantage over another, the bill does not require, indeed, I understand it not to permit, the extinguishment of the natural advantage in competition for the benefit of the competitor which has not the advantage. Am I correct in that interpretation?

"Mr. WHEELER. The Senator is entirely correct, and I thank him for his statement. In the rate-making provision, and in three different places in the bill, we wrote in such a provision specifically so as to protect them."

In 84 Cong. Rec., at page 5958, the following appears:

"Mr. TRUMAN. Mr. President, the reason the discussion always gets back to the railroads is that the railroads handle about 67 percent of all the traffic. In 1926 they handled 75 percent of all the traffic. The present condition of the railroads is due to a great many things which are not necessary to be considered at this time. The railroads are absolutely essential to the welfare of the country, and they should not be discriminated against any more than any other method of transportation should be discriminated against. The object of the pending bill is to try to put all methods of transportation on an equal basis [equal before the law]. If it will not do that we shall have failed in our effort."

In 86 Cong. Rec., at page 10172, the following appears:

"The conferees are unanimously in harmony in the viewpoint that the inherent advantages of each type of carrier should be preserved for the benefit of the Nation. Legitimate regulation must look to the protection of the economic advantage of each type of carrier against destructive competition of the other. No carriers should be required to charge unreasonable rates for the benefit or purpose of compelling diversion of traffic to a competitor.

"The other provisions of this bill afford ample protection for the preservation of the inherent advantages of water transportation."

Commission to make any findings different from those it has made in this case. Neither is there anything in the Water Carrier Act, including section 307 (d), that requires the Commission to find that it was "necessary or desirable in the public interest" that joint barge-rail rates should be established and differentials fixed differently from those already established and in effect.

II.

Discrimination prohibited by Section 3 (4) of the Act does not result when a railroad demands its full local rate on traffic received from a barge line connection while accepting as compensation a lesser amount, in the form of a division of a joint through rate on such traffic received from a rail connection, under a joint rate agreement

The contrary allegation is made by appellant barge lines, in their brief, p. 34, and constitutes the second ground upon which these appellants challenge the validity of the Commission's order. This allegation is based upon the finding of the Commission (R. 31–32) that the discrimination under section 3 (4) of the Act may not be predicated upon the fact that the separately established rate paid by a shipper, on ex-barge traffic beyond East St. Louis, is greater than the unpublished division of a joint through all-rail rate received by the rail carriers for the transportation beyond East St. Louis with respect to ex-rail traffic moving from the same origin to the same destination.

In support of their claim that appellee railroads treat the barge lines differently in the matter of rates on ex-barge sulphur, than they treat connecting southwest rail lines on ex-rail sulphur, appellants refer (p. 8 of their brief) to the joint barge-rail rate on sulphur of $6.66 from Port Sulphur to Danville, out of which the Federal and American barge lines receive a division of $4.40 for their haul to East St. Louis, and the appellee rail carriers receive a division of only $2.26 for their haul from East St. Louis to Danville, while the rail carriers, receive from their rail connections, reaching that point from Galveston, an unpublished division of the all-rail rate of $9.184, an amount (not shown in the record) [15] less than their local rate of $2.95 for the East St. Louis-Danville haul (R. 82–83).

Under appellant barge lines' theory of the case a division of a joint all-rail rate is the same thing as a rate or charge and may be compared with

[15] There is no requirement of law or any rule or regulation of the Commission that agreements of railroads as to division of rates and charges be published or filed with the Commission, or the amount of the division be made known to the public. *Acme Mills* v. *Director General*, 81 I. C. C. 492; *Chase & Co.* v. *New York Central R. Co.*, 161 I. C. C. 614, 616. Divisions of rates are based upon private contracts between the carriers concerned and do not have to be approved by the Commission, except as provided in section 15 (6) of the Act. *St. Louis S. W. Ry Co.* v. *United States*, 245 U. S. 136, see footnote 2, pages 139–140.

and treated the same as a published rate or charge paid by a shipper.

In their complaint before the Commission, these appellants did not raise the issue that a division of rates between carriers was a rate within the meaning of section 3 (4) of the Act, or that discrimination may exist because of the difference between a local rate and a division of rates. The charge of discrimination in the proceedings before the Commission was predicated only upon the allegation that appellee railroads participate in through routes and joint rates with other railroads, over all-rail routes, while contemporaneously refusing to join with the barge lines in through routes and joint rates, with reasonable differentials under the all-rail rates, and that refusal to do so resulted in rates and charges over barge-rail routes that are excessive and unreasonable, and such refusal is discriminatory against appellants (Appellants' complaint in the Commission proceedings, Paragraphs III and V) (R. 63-64).[16]

That the issue of whether divisions of rates between carriers are rates within the meaning of

[16] The only other allegation appellants made in their complaint before the Commission with respect to discrimination was in those paragraphs, except the allegation in Paragraph IV, relative to a reduction of all-rail rates on sulphur from Galveston and other Texas points and Port Sulphur to Danville, which became moot by reason of the fact that the rates referred to therein were suspended by the Commission and later withdrawn (R. 96).

section 3 (4) of the Act was not raised by the complaint before the Commission, or relied upon by appellants in the Commission proceedings, is further shown at the oral argument before the Commission.[17] During the argument counsel for appellant barge lines stated (R. 147–148) that he did not think this was "one of the issues" of the complaint because the complaint of the barge lines "asks for joint through rates to cure the discrimination." (See also R. 31.) Therefore, since the question was not raised or pressed, and in fact was waived, before the Commission, it should not be considered upon court review. *United States* v. *Hancock Truck Lines, Inc.*, 324 U. S. 774; *General Transportation Co.* v. *United States*, 65 F. Supp. 981, affirmed *per curiam* 329 U. S. 668; *United States* v. *Tucker Truck Lines*, 344 U. S. 33; *W. J. Dillner Transfer Co.* v. *United States*, 101 F. Supp. 506, affirmed *per curiam* 344 U. S. 883; *Helvering* v. *Tex.-Penn Oil Co.*, 300 U. S. 481, 498.

The fact that the Commission discussed and considered this question in its decision does not

[17] The only way the question of divisions arose before the Commission was that, during the hearing, it was brought out that the rail carriers received a division of the joint rail rates for their haul from East St. Louis to Danville, an amount less than the local rate of $2.95 between these points. In later proceedings the barge lines contended that this constituted a violation of section 3 (4). See Reply of Complainants [Barge Lines] To Defendants' Exceptions (pp. 11–12) and Petition For Reopening, etc., filed with the Commission on April 24, 1952.

lessen the force of the argument that it cannot be raised on judicial review. The Commission merely answered a contention not raised in the complaint before it and if properly before it, not pressed, but in fact waived. Even assuming that the issue of divisions versus rates was before the Commission, it is submitted that a division of a joint through rate is not a "rate" or "charge" as those terms are used in section 3 (4) of the Act, and a finding of discrimination could not be based on that issue.

The Commission distinguished these two terms in its report on reconsideration (R. 31), where it stated and found that:

> * * * The claim here is, not that the complainants are discriminated against in the matter of divisions of joint rates, as was the case in *Western Pac. R. Co.* v. *Southern Pac. Co.*, 55 I. C. C. 71, referred to by the complainants, nor that the separately established rate paid by the shipper as one of the components of a combination rate is greater for the transportation of ex-barge traffic than for ex-rail traffic, which was the situation in *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, also cited by the complainants, but that the separately established rate paid by the shipper on ex-barge traffic beyond East St. Louis is greater than the unpublished division of a joint through all-rail rate received by the rail carriers for the transportation beyond East St. Louis on

> ex-rail traffic moving from the same origin to the same destination. The comparison is between a rate or charge paid by a shipper and a division of a joint rate received by rail carriers, and is of unlike things. Basically divisions of joint rates are the result of contractual arrangements between carriers; they are not "rates" or "charges" as those terms are used in section 3 (4) of the act. A seemingly contrary opinion expressed in *Western Pac. R. Co.* v. *Southern Pac. Co., supra,* upon which the complainants rely, was made, as above indicated, under circumstances different from those now before us, and is not controlling here.

The Commission does not consider a division of a joint rate between carriers to be in the same category as a published rate which a shipper pays. It is true that in the early case of *Western Pacific R. R. Co.* v. *Southern Pacific Co.,* 55 I. C. C. 71, decided in 1919, the Commission held that the expression of rates and charges in the form of divisions "makes them rates and charges, which may be discriminatory." However, that case is distinguishably from the instant case as is referred to in the above excerpt.[18] That case was

[18] In that case, the issue was whether the divisions of joint fares were discriminatory between connecting carriers. In the instant case, no joint rates between the barge and rail lines were in existence on sulphur or had ever been in existence. In such a situation, the question of divisions of rates does not and cannot arise. It is only when joint rates have been established that questions of divisions may become an issue before the Commission or the courts.

decided at a time when the Commission was not certain as to the extent of its powers to establish divisions of joint rates which, then, was controlled by the Act of June 18, 1910, and enacted as a part of section 15 as a corollary to the power delegated to it to prescribe joint rates (Chapter 309, U. S. Statutes at Large, Part I, Public Law 511).[19]

As a result of the uncertainties of the extent of the Commission's power over divisions of joint rates the Interstate Commerce Act was amended by the Transportation Act of 1920 (Ch. 91, Sec. 418, Stat. 486), by the substitution of the present paragraph (6)[20] for the provision quoted in

[19] The authority given to the Commission by this statute was as follows:

"* * * Whenever the carrier or carriers, in obedience to such order of the commission or otherwise, in respect to joint rates, fares, or charges, shall fail to agree among themselves upon the apportionment or division thereof the commission may, after hearing, make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto; which order shall take effect as a part of the original order."

[20] Section 15 (6) now reads as follows:

"Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have

footnote 19. See *Brimstone R. R. Co.* v. *United States*, 276 U. S. 104, 119–123.

The *Western Pacific case*, *supra*, (191 I. C. C. 127) involved the issue of joint passenger fares which had been agreed upon by the carriers after they had voluntarily entered into through routes and joint rates with each other. The complainants in the Commission proceedings had invoked section 3 (2) (now section 3 (4) of the Act), instead of section 15, which undoubtedly was due to the lack of clarity of the Commission's power over such divisions. The Commission, recognizing that the complainant was entitled to some readjustment of the division of joint fares, which was shown by the evidence

been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."

in the case to be unjust and unreasonable as between the parties, heard and determined the issue under section 3, not being certain of the extent of its power under section 15. In any event that decision is to be evaluated in the light of the statutory provisions then existing, as heretofore described, and the circumstances peculiar to that particular case. It is inconceivable that such a case now coming before the Commission, involving divisions of joint rates, would be entertained under the present provisions of section 3 (4) of the Act.

As we have heretofore pointed out, appellant barge lines charged in their complaint before the Commission (R. 63–64) that the railroads had failed to establish through routes and joint rates with water carriers, in violation of sections 1 and 307 (d) of the Act; and that they were maintaining rates and charges which were discriminatory against barge lines, in violation of section 3 (4). This latter section, insofar as pertinent here, deals only with "rates, fares, and charges" and it is difficult to see how the issue of divisions of joint rates can be predicated upon section 3 (4) since no discrimination prohibited therein can arise because of divisions of joint rates between the parties thereto.

The Commission has held since the earliest days of its existence as a regulatory body that a comparison of a division of a joint rate and a local

rate is not a proper test of the lawfulness of either. *Board of Trade of Troy, Ala.* v. *Ala. Mid. Railway Co.*, 6 I. C. C. 1; *Bituminous Coal to Youngstown*, 163 I. C. C. 3, 12. This Court held in *Parsons* v. *Chicago & Northwestern Ry.*, 167 U. S. 447, 457, that the fact that a portion of a through joint rate received by one of the carriers, parties thereto, may be less than its local rate, is not questioned. See also *Texas & Pacific Ry. Co.* v. *I. C. C.*, 162 U. S. 197, 239. It is submitted that the establishment of local rates are predicated upon considerations wholly different from those employed in determining the divisions of joint rates. This led the Commission to observe in its report on reconsideration (R. 32) that "The comparison is between a rate or charge paid by a shipper and a division of a joint rate received by rail carriers, and is of unlike things."

The distinction between local rates and divisions of joint rates is further emphasized by the fact that when Congress amended section 15 of the Interstate Commerce Act in 1920, giving the Commission for the first time definite powers (which theretofore had been uncertain) over division of rates, it set forth certain standards or criteria by which the Commission was to be governed in prescribing the amount of the division. A search of the Act does not reveal any similar provision governing the Commission's prescription of other characters of rates.

In support of their argument that the difference between divisions of joint all-rail rates and a local rate is offensive to the prohibition against discrimination in section 3 (4) of the Act, the appellant barge lines rely upon the decision of this Court in the *Mechling* case, *supra* (brief, p. 46 et seq.). As we have already shown, page 40, et seq. of this brief, the *Mechling* case is readily distinguishable. That case involved proportional rates which were alike in their nature and basis of establishment. In the instant case appellants are attempting to compare a rate or charge paid by a shipper and a division of a joint rate received by rail carriers, which cannot be done (R. 32).

The United States is of the view that since the refusal of the railroads to establish joint rates with the barge lines "constitutes a discrimination in rates" between connecting lines, it is unnecessary to reach the question of whether a division of a joint through rail rate is a rate within the meaning of section 3 (4) of the Act. We agree that it is not necessary to reach the question, but for a different reason. Our view is that the question of divisions versus rates is not before this Court, because that question was not raised by appellant barge lines in their complaint before the Commission, and if it were raised it was waived by counsel for the barge lines at the oral argument (R. 147, 148). If the Court considers that the question is properly before it, we submit

for the reasons stated above, the question should be resolved in favor of the conclusions reached by the Commission.

Appellants argue that because the railroads voluntarily entered into through routes and joint rates with the Federal and American barge lines, in regard to the movement of sulphur from Port Sulphur, La., via East St. Louis to Danville, Ill., at a joint rate of $6.66, with a division of $2.26 to the rail carriers and $4.40 for the barge lines, it is unreasonable and discriminatory for the railroads not to enter into such rates and rates with the barge lines with the same division of rates on sulphur from Galveston.

The answer to this argument is that the railroads originate the sulphur the barge lines want to move from Galveston. The sulphur moving from Port Sulphur originates with the barge lines. The discrimination is not alleged to be with respect to sulphur from Port Sulphur but from Galveston. What the East St. Louis-Danville lines receive as their share of the rate from Port Sulphur is not a fair standard of measurement of the reasonableness as to the lawfulness of the rate from Galveston. In *Tozer* v. *United States*, 52 F. 917, certiorari denied 146 U. S. 354, the Circuit Court for the Eastern District of Missouri held, pages 918–919, that where two connecting lines agree on a joint through tariff, such tariff, or the

share of it which either takes, is not the standard by which to determine whether either line violates, by its local rates, section 3 of the Interstate Commerce Act forbidding undue preference (the same would be equally true with respect to discrimination). The court, referring to its decision in *Chicago & N. W. Ry. Co.* v. *Osborne,* 52 F. 912, announced at about the same time as the *Tozer* decision, stated, page 919:

> It was there held that each company established its own tariff, and that the reasonableness of the tariff of one is not determined by that of any other. * * * that two connecting companies, forming by agreement a joint through tariff, create thereby, as it were, a line new and independent of that of either of the two connecting companies; and hence that such joint tariff, or the share which either takes of such tariff, is not the basis by which the reasonableness of its local tariff is to be determined.

In the instant case, the barge lines not having the "inherent" or "natural advantage," with respect to the sulphur traffic at Galveston, seek to overcome that handicap by forcing the railroads operating from East St. Louis to Danville to forego the difference between their local rate of $2.95 and $2.26 (which they supposedly receive as a division on sulphur moved from Port Sulphur), or 69 cents per ton, partially to offset the $1.50 per ton cost to the shipper at Galveston.

In any event a railroad does not have to agree to establish through routes and joint differential rates with other railroads or with water carriers at every point merely because it does so at one point. If so, it would follow, that such routes and rates would be compelled everywhere if established at any given point.

Finally, in regard to appellant barge lines' contention that the District Court did not pass upon the question of discrimination under section 3 (4) of the Act, or on the question of whether a division of a joint rate is a rate within the meaning of that section (barge lines' brief, pp. 17–18), it is submitted that the court below did consider these questions.

The Court specifically found at page 33 of the opinion (R. 52; 129 F. Supp. 28) that:

> When the whole record is considered in the light of all the provisions of the Act and the many cases construing same, we think plaintiffs have not shown their claim of discrimination to be meritorious.

This finding or conclusion is adequate. We know of no law or decision of the courts requiring that a different kind of finding or conclusion should be made or stated.

Even assuming that all the issues raised by appellants may not have been specifically discussed in the Court's opinion, nevertheless this would be similar to a court saying as this Court

said *United States* v. *Capital Transit Co.*, 338 U. S. 286, 291:

> We have examined other contentions urged in support of the District Court's judgments and find that all are without merit.

In *Schilling* v. *Schwitzer-Cummins Co.*, 142 F. 2d 82, 84, the Court said:

> * * * While counsel may be disappointed that findings do not discuss propositions sincerely contended for, that, alone, does not make them inadequate or suggest that such propositions were not understood by the court.

We, therefore, submit that it is not necessary that the trial court make findings asserting the negative of each issue of fact raised. As the Court said in *Carr* v. *Yokohama Specie Bank, Limited*, 200 F. 2d 251, 255:

> * * * Nor is it necessary that the trial court make findings asserting the negative of each issue of fact raised. It is sufficient if the special affirmative facts found by the court, construed as a whole, negative each rejected contention. The ultimate test as to the adequacy of findings will always be whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision and whether they are supported by the evidence.

CONCLUSION

The judgment entered by the district court should be affirmed.

Respectfully submitted.

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MARCH 7, 1956.

APPENDIX

Pertinent Provisions of the Interstate Commerce Act

National Transportation Policy

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Sec. 1 (4) It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request

therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

Sec. 3 (4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

SEC. 15 (1). That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed,

or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Sec. 15 (3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

SEC. 15 (4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may

determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

Sec. 15 (6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and

the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

Sec. 307 (d) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water * * *.

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